NPS ARCHIVE
1997.12
MORGAN, S.

NAVAL POSTGRADUATE SCHOOL
Monterey, California

THESIS

THE MINI-TRIAL: A VALUABLE ALTERNATIVE DISPUTE RESOLUTION TOOL FOR THE UNITED STATES NAVY

by
Steven A. Morgan

December 1997

Principal Advisor: David V. Lamm
Associate Advisor: Mark Stone

Thesis
M8226636

Approved for public release; distribution is unlimited.

LEY KNOX LIBRARY
AL POSTGRADUATE
NTEREY CA 93

REPORT DOCUMENTATION PAGE

Form Approved OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington DC 20503.

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	December 1997	Master's Thesis

4. TITLE AND SUBTITLE
The Mini-Trial: A Valuable Alternative Dispute Resolution Tool for the United States Navy

5. FUNDING NUMBERS

6. AUTHOR(S)
Morgan, Steven A.

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
Naval Postgraduate School
Monterey, CA 93943-5000

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)

10. SPONSORING / MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES
The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

12a. DISTRIBUTION / AVAILABILITY STATEMENT
Approved for public release; distribution is unlimited.

12b. DISTRIBUTION CODE

13. ABSTRACT *(maximum 200 words)*

In order to avoid unnecessary, time consuming, and costly litigation, the Department of Defense, and more specifically the United States Navy, has adopted the use of alternative dispute resolution (ADR) to resolve contract disputes. One of the less-used but highly successful ADR techniques is known as the Mini-Trial.

The primary goals of this thesis are to provide contracting professionals and attorneys with a better understanding of the Mini-Trial, explore how the Navy might make better use of the technique, and outline the steps the Navy should take to further implement its use. The thesis provides information on the Mini-Trial's background, factors for use, advantages and disadvantages, format, and roles of participants. The researcher found that there are a number of issues surrounding the Mini-Trial including; problems with neutrals and principals, and the perception that the Navy was reluctant to use the technique. Principal findings from the research revealed that there are key measures of success for the Mini-Trial, that barriers exist to convince contractors to participate, that there are certain conditions for its use, and that the Navy will increase its use of the technique in the future. Principal recommendations are that the Navy should not second guess its principals, ensure settlement funds are paid promptly, establish an agency ombudsman to answer ADR questions, and conduct face-to-face discussions with contractors to convince them that the Mini-trial and ADR are in both parties' best interest.

14. SUBJECT TERMS
Mini-Trial, Alternative Dispute Resolution, ADR, Contract Disputes

15. NUMBER OF PAGES
146

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFI- CATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT
Unclassified	Unclassified	Unclassified	UL

NSN 7540-01-280-5500

Standard Form 298 (Rev. 2-89)
Prescribed by ANSI Std. 239-18

Approved for public release; distribution is unlimited

THE MINI-TRIAL: A VALUABLE ALTERNATIVE DISPUTE RESOLUTION TOOL FOR THE UNITED STATES NAVY

Steven A. Morgan
Lieutenant Commander, United States Navy
B.S., Villanova University, 1987

Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF SCIENCE IN MANAGEMENT

from the

NAVAL POSTGRADUATE SCHOOL
DECEMBER 1997

NPS ARCHIVE
1997.12
MORGAN, S.

Thesis
M
c.2

DUDLEY KNOX LIBRARY
NAVAL POSTGRADUATE SCHOOL
MONTEREY CA 93943-5101

ABSTRACT

In order to avoid unnecessary, time consuming, and costly litigation, the Department of Defense, and more specifically the United States Navy, has adopted the use of alternative dispute resolution (ADR) to resolve contract disputes. One of the less-used but highly successful ADR techniques is known as the Mini-Trial.

The primary goals of this thesis are to provide contracting professionals and attorneys with a better understanding of the Mini-Trial, explore how the Navy might make better use of the technique, and outline the steps the Navy should take to further implement its use. The thesis provides information on the Mini-Trial's background, factors for use, advantages and disadvantages, format, and roles of participants. The researcher found that there are a number of issues surrounding the Mini-Trial including; problems with neutrals and principals, and the perception that the Navy was reluctant to use the technique. Principal findings from the research revealed that there are key measures of success for the Mini-Trial, that barriers exist to convince contractors to participate, that there are certain conditions for its use, and that the Navy will increase its use of the technique in the future. Principal recommendations are that the Navy should not second guess its principals, ensure settlement funds are paid promptly, establish an agency ombudsman to answer ADR questions, and conduct face-to-face discussions with contractors to convince them that the Mini-trial and ADR are in both parties' best interest.

TABLE OF CONTENTS

I. INTRODUCTION 1

A. BACKGROUND 1

B. OBJECTIVES 2

C. RESEARCH QUESTIONS 2

1. Primary Research Question 3

2. Secondary Research Questions 3

D. SCOPE 3

E. LIMITATIONS 4

F. ASSUMPTIONS 5

G. LITERATURE SEARCH AND METHODOLOGY 5

H. ORGANIZATION OF STUDY 6

II. ALTERNATIVE DISPUTE RESOLUTION LEGISLATIVE HISTORY AND USAGE 9

A. INTRODUCTION 9

B. CONTRACT DISPUTES ACT OF 1978 9

C. ADMINISTRATIVE DISPUTES RESOLUTION ACT OF 1990 10

D. FEDERAL ACQUISITION STREAMLINING ACT OF 1994 12

E. ADMINISTRATIVE DISPUTES RESOLUTION ACT OF 1996 13

F. FEDERAL ACQUISITION REGULATION 14

G. DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT 15

H. EXECUTIVE ORDERS 12979 AND 12988 15

I. ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION 16

J. DISADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION 17

K. INCREASED USAGE OF ALTERNATIVE DISPUTE RESOLUTION 18

1. Reasons For Increased Usage of ADR 18

2. Statistics For ADR Success 20

L. SUMMARY 21

III. INTRODUCTION OF THE MINI-TRIAL 23

A. OVERVIEW OF THE MINI-TRIAL 23

B. THE HISTORY OF THE MINI-TRIAL 23

C. ADVANTAGES AND DISADVANTAGES OF THE MINI-TRIAL 25

1. Advantages of the Mini-Trial 25

2. Disadvantages of the Mini-Trial 26

D. FACTORS FOR AND AGAINST THE USE OF THE MINI-TRIAL 27

1. Factors For the Use of the Mini-Trial 27

2. Factors Against the Use of the Mini-Trial 28

E. TIMING OF THE MINI-TRIAL 29

F. COMMON REASONS FOR CHOOSING OTHER ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES 31

G. SUMMARY 32

IV. KEY ELEMENTS OF THE MINI-TRIAL 33

A. INTRODUCTION 33

B. EVALUATING THE POSSIBLE USE OF THE MINI-TRIAL 33

C. SELECTING AND PREPARING PRINCIPALS 34

1. Selecting a Principal 34

2. Analysis 35

3. Preparation of the Principal 36

D. USE OF A THIRD PARTY NEUTRAL 36

1. Possible Roles For Neutrals 36

2. Survey Results For Neutral Roles 37

3. Analysis 40

4. Choice of Neutrals 41

5. Analysis 44

E. THE MINI-TRIAL AGREEMENT 45

1. Purpose and Recommendations For Drafting the Mini-Trial Agreement 45

2. Exchange of Position papers 46

3. Mini-Trial Schedule 47

4. Best Points Arguments 48

5. Location of the Mini-Trial 48

6. Allocation of Expenses 49

F. THE MINI-TRIAL HEARING 49

G. POST-PRESENTATION NEGOTIATIONS 51

H. DOCUMENTING THE SETTLEMENT AGREEMENT 52

I. SUMMARY 53

V. ISSUES IN THE USE OF THE MINI-TRIAL 55

A. U.S. NAVY'S RELUCTANCE TO USE THE MINI-TRIAL 55

1. Survey Results 55

2. Analysis 57

B. PROBLEMS ENCOUNTERED WITH NEUTRALS 58

1. Survey Results 58

2. Analysis 60

C. PROBLEMS ENCOUNTERED WITH SENIOR MANAGEMENT PRINCIPALS 64

1. Survey Results 64

2. Analysis 66

D. UNASSISTED MINI-TRIAL 70

1. Discussion 70

2. Analysis 71

E. SUMMARY 74

VI. ANALYSIS OF THE MINI-TRIAL 77

A. INTRODUCTION 77

B. MEASURES OF SUCCESS OF THE MINI-TRIAL 77

1. Survey Results 77

2. Analysis 80

C. MOST EFFECTIVE USAGE OF THE MINI-TRIAL 84

1. Literature Review 84

2. Survey Results 85

3. Analysis 86

D. BARRIERS TO CONVINCING CONTRACTORS TO PARTICIPATE IN THE MINI-TRIAL 91

1. Literature Review 91

2. Survey Results 91

3. Analysis 96

E. FUTURE USE OF THE MINI-TRIAL 99

1. Survey Results 99

2. Analysis 101

F. SUMMARY 104

VII. CONCLUSIONS AND RECOMMENDATIONS 107

A. SUMMARY 107

B. CONCLUSIONS 108

C. RECOMMENDATIONS 116

D. ANSWERS TO RESEARCH QUESTIONS 119

1. Primary Research Question 119

2. Secondary Research Questions 120

E. AREAS FOR FURTHER RESEARCH 124

APPENDIX: LISTING OF SURVEY PARTICIPANTS 125

LIST OF REFERENCES 127

INITIAL DISTRIBUTION LIST 133

I. INTRODUCTION

A. BACKGROUND

In recent years, a quiet revolution has been occurring in the world of U.S. Government contract dispute resolution. The Government has sought out mechanisms aimed at minimizing conflict, reducing financial costs of dispute litigation, and preserving the working relationship of parties involved in disputes. Traditionally, parties have relied heavily on informal negotiations and litigation through the U.S. Court System. Although informal negotiations can resolve some contract disputes, many disputes are too complex or too highly charged to be resolved in an informal setting. However, formal litigation is usually very costly and time consuming. It creates a hostile environment between the parties involved. According to the late Supreme Court Justice Warren E. Burger,

> The existing judicial system is too costly; too painful, too destructive, too inefficient for a truly civilized people....Reliance on the adversarial process as the principal means of resolving conflicts is a mistake that must be corrected....For some disputes, trials will be the only means, but for many claims, trial by adversarial contest must in time go the way of the ancient trial by battle and blood. [Ref. 9]

In light of Justice Burger's comments, formal litigation should be viewed solely as the last resort in dispute resolution.

To bridge the gap between informal negotiations and formal litigation, a number of techniques known collectively as alternative dispute resolution (ADR) have been adopted by Government agencies to resolve contract disputes. The Federal Acquisition Regulation (FAR) defines ADR as "any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation". [Ref. 19, Part

33.204] ADR techniques, such as Fact-finding, Mediation, non-binding Arbitration, Negotiation, Partnering, and the Mini-Trial, furnish a faster, less expensive way to resolve disputes. In general, ADR covers any *voluntarily* agreed upon method to resolve a dispute before it goes to litigation. Without voluntary participation, ADR is not likely to resolve a contract dispute. This thesis explores in detail the alternative dispute resolution technique known as the Mini-Trial and issues surrounding its use.

B. OBJECTIVES

The primary objectives of this thesis are:

1. To provide a better understanding of the Mini-Trial technique and its use as a method of resolving contract disputes in the Navy.

2. To explore the impact of recent Executive Orders, legislation, and regulations on the Navy's use of the Mini-Trial and alternative dispute resolution.

3. To determine whether the Navy has been reluctant to use the Mini-Trial technique and to explore conditions where the Navy might make better use of the Mini-Trial.

4. To examine the Navy's use of the alternative dispute resolution technique known as the "unassisted" Mini-Trial.

5. To identify what barriers exist to convincing contractors to participate in the Mini-Trial and the action the Navy should take to overcome these barriers.

6. To assess the future usage of the Mini-Trial as an effective alternative dispute resolution technique.

C. RESEARCH QUESTIONS

In addressing the objectives of this thesis, the following questions have been structured:

1. Primary Research Question

How can the United States Navy most effectively utilize the Mini-Trial as a method of alternative dispute resolution?

2. Secondary Research Questions

a. What is the Mini-Trial technique and how does it function?

b. What are the laws and regulations associated with the Mini-Trial and ADR?

c. To what extent has the United States Navy utilized the Mini-Trial and what have been the results of its use?

d. What are the measures of success in employing the Mini-Trial and under what conditions should the Mini-Trial be considered for use?

e. What actions should the Navy take to most effectively utilize the Mini-Trial as a viable form of alternative dispute resolution?

D. SCOPE

The scope of this thesis is to provide background, references, and recommendations so that Department of Defense and United States Navy contracting officials and attorneys can make intelligent decisions as to when Mini-Trials could and should be utilized. The areas focused upon will include the following:

1. Identifying the alternative dispute resolution technique known as the Mini-Trial, to include discussion of its form, conditions for use, and advantages and disadvantages.

2. Examining the Navy's use of the Mini-Trial as a method of alternative dispute resolution.

3. Developing criteria for measuring the success of the Mini-Trial.

4. Recommending actions that the Navy could take to further implement the use of the Mini-Trial.

There will be no in-depth analysis of other alternative dispute resolution techniques used by the United States Navy or the Department of Defense. Furthermore, there will be no attempt to imply that every, or for that matter any, contract dispute is identical. Every dispute is unique, therefore Government contracting officials need to exercise good sense and sound business judgment when deciding what method of resolution should be utilized. Finally, there will be no attempt to generate empirical data. Only existing data and information will be used in this thesis.

E. LIMITATIONS

Despite a plethora of magazine articles, conference papers, and Government reports, there is little or no empirical data to support the cost and time benefits of the Mini-Trial or other alternative dispute resolution techniques. All information regarding alternative dispute resolutions is based on personal experience and expert opinion, not on factual data. Consequently, all recommendations and conclusions are based on theoretical information available. Due to the nature of the study, the researcher surveyed a large percentage of Navy attorneys. Although their input was invaluable, their responses may have skewed the survey results of all Government attorneys. Furthermore, a future study involving a larger sampling of individuals may be necessary to confirm the findings of this thesis due to the limited number of Board of Contract Appeals judges and Government and private attorneys who participated in the researcher's survey.

F. ASSUMPTIONS

This thesis was written under the following assumptions:

1. The reader has some knowledge of Federal contracting regulations concerning contract dispute settlement.

2. The reader has a good working understanding of other alternative dispute resolutions techniques (besides the Mini-Trial), their advantages and disadvantages, and characteristics for case suitability.

3. The reader has legal assistance available to clarify and enhance the information provided in the study.

G. LITERATURE SEARCH AND METHODOLOGY

The literature review focused on information available from private and public agencies that specialize in alternative dispute resolution. The majority of the literature was provided by academia, professional organizations (American Bar Association and National Contract Management Association), Government agencies (Departments of the Army, Air Force, and Navy, the Veterans Administration), Boards of Contract Appeals (General Services Administration, Engineering, Armed Services), and from private practitioners of law. The literature was gathered from journals and periodicals including legal, judicial, law reviews, conflict resolution, and policy manuals. The Federal Acquisition Regulation (FAR) and Defense Supplement to the FAR were also reviewed. The literature review was conducted to provide the researcher with a well-rounded view of the Mini-Trial technique and issues surrounding its usage. Although the literature search was by no means exhaustive of the articles that have been published regarding the Mini-Trial, the data reviewed provided a satisfactory representation of what was available. The bibliography contains a listing of the materials reviewed by the researcher.

A survey was conducted by the researcher to gather expert opinion on issues surrounding the Mini-Trial. Due to the limited number of practitioners of the Mini-Trial, only 26 personnel from various Government agencies and private law firms were surveyed. Personnel from the Federal Government were chosen based on recommendations from various Government alternative dispute advocates and practitioners. In many cases, personnel surveyed on the phone recommended other points of contact within the Government and private practice. All individuals surveyed were very helpful in clarifying ideas and perceptions, and providing source materials. A listing of individuals (with their title and organization) participating in the survey is attached in the Appendix.

H. ORGANIZATION OF STUDY

This thesis is organized around seven chapters. Chapter I provides a brief introduction of the need for alternative dispute resolution and outlines the objectives and research questions of the thesis. It also delineates the scope, limitations, and assumptions of the thesis and outlines the methodology used to conduct the necessary research.

Chapter II discusses the Executive orders, legislation, and regulations that impact the Government's use of the Mini-Trial and alternative dispute resolution. The chapter highlights the advantages and disadvantages associated with alternative dispute resolutions. The chapter also examines the reasons for the recent increase in the use of alternative dispute resolution. Chapter II concludes with a review of statistics surrounding the successful use of alternative dispute resolution.

Chapter III introduces the reader to the Mini-Trial technique, provides a definition of the Mini-Trial, and explores its background. The chapter discusses the factors for and against the use of the technique, the timing of its use, and states its advantages and disadvantages. The chapter concludes with an examination of the most common reasons for selecting other alternative dispute resolution techniques over the Mini-Trial.

Chapter IV discusses key elements of the Mini-Trial including the initiation of the use of the Mini-Trial, selection and preparation of principals, and the use of third party neutrals. The researcher provides analysis of the most effective role for the neutral as well as selection of the neutral. The chapter examines in detail the Mini-Trial agreement, including the purpose of the agreement, the use of position papers and schedules, the concept of *best points* presentations, location for the trial, and allocation of trial expenses. Furthermore, the chapter describes the flow of the trial, follow-on negotiations, and documentation of the settlement agreement.

Chapter V is the first of two chapters exploring issues relating to the use of the mini-trial. The chapter explores whether there has been any reluctance by the Navy to use the Mini-Trial. It also analyzes the problems encountered with third party neutrals and principals during Mini-Trials. The chapter concludes with discussion and analysis of the Navy's use of the alternative dispute resolution technique known as the "unassisted" Mini-Trial.

Chapter VI continues the exploration of issues surrounding the Mini-Trial begun in Chapter V. The chapter provides discussion and analysis of the measures of success of the Mini-Trial and how the Navy could most effectively utilize the technique. The chapter also examines the barriers that exist to convince a contractor to participate in the Mini-

Trial technique and suggests how the Navy might overcome the barriers identified. The chapter concludes with an analysis of the Navy's future use of the Mini-Trial.

Chapter VII summarizes the significant findings of the study, answers the primary and secondary research questions, and makes conclusions and recommendations based on the discussion and analysis of the information presented in previous chapters. The chapter concludes with recommendations for further research.

II. ALTERNATIVE DISPUTE RESOLUTION LEGISLATIVE HISTORY AND USAGE

A. INTRODUCTION

In recent years, the Government has used legislation, Executive Orders, and regulations to encourage the use of ADR to resolve contract disputes. From ADR's early appearance in the Contract Disputes Act in 1978, to the most recent Administrative Dispute Resolution Act in 1996, Congress' statutory ADR initiatives have increased ADR usage among Government agencies. This chapter will highlight major ADR initiatives and their impact on Government agencies. In addition, the chapter will discuss ADR's advantages and disadvantages and the use of ADR within the Department of Defense and Federal Government.

B. CONTRACT DISPUTES ACT OF 1978

The Contract Disputes Act of 1978 (CDA) was designed to furnish a legal and administrative system to resolve contract claims.[Ref. 19, Sec. 33.202] The Act encourages dispute resolution at "the earliest stage feasible and by the fastest and least expensive means possible" prior to litigation and offers alternate forums for handling different disputes.[Ref. 2, pg. 1] The Act's primary goal is to ensure that both the contractor and the Government receive fair and equitable treatment in regards to a dispute. Formal procedures and time frames were established for parties to file disputes and appeals. The Act made these procedures mandatory for all contract disputes. The following steps highlight the Act's requirements:[Ref. 17, pg. 24-26]

1. First and foremost, the contracting officer should attempt to negotiate and resolve the dispute.

2. If these negotiations fail, the contractor must receive a contracting officer's final decision (COFD) in regards to the dispute.

3. Once the COFD is issued, the contractor may accept the decision or file an appeal with either:

    a. the Board of Contract Appeals (BCAs) within 90 days, or

    b. the U.S. Court of Claims within one year.

4. The BCA and U.S. Court of Claims render their decisions.

5. Appeals to BCA decisions must be submitted to the Court of Appeals for the Federal Circuit within 120 days of the Board's decision; appeals of the Court of Claims must be submitted within 60 days to the Court of Appeals.

6. If further appeals are considered necessary, parties submit a final appeal within 60 days to the United States Supreme Court .

Based on the results of a survey conducted by the researcher, the impact of the Contract Disputes Act was considered minimal because the Act merely formalized an already existing ADR process. Contracting Officers always had the authority to resolve disputes at their level and contractors could still appeal an adverse Contracting Officer's final decision to a Board of Contract Appeals.

C. ADMINISTRATIVE DISPUTES RESOLUTION ACT OF 1990

The Administrative Dispute Resolution Act of 1990 (ADRA 1990) was Congress' attempt to encourage the voluntary use of ADR to resolve Government disputes prior to litigation.[Ref. 28, pg. 13] The Act stated that "an agency may use an ADR proceeding

for the resolution of an issue in controversy...if the parties agree to such proceedings".[Ref. 4, pg. 1] The ADRA 1990 amended the CDA by permitting contracting officers to utilize ADR techniques to resolve claims. The Act recognized several types of ADR techniques (including negotiation, mediation, arbitration and mini-trials) that could be employed in different circumstances. However, it recognized that ADR was not appropriate in all situations.[Ref. 1, pg. 5] The ADRA 1990 also incorporated a sunset provision terminating its effect in October 1995.[Ref. 1, pg. VI]

The Act provided Federal agencies with a great deal of flexibility on how and when to use ADR but mandated the following key program requirements:[Ref.1, pg. V]

1. Develop a policy addressing the use of ADR in resolving contract disputes.
2. Appoint a senior official as "dispute resolution specialist" who is responsible for implementation of the Act and for developing agency ADR policy.
3. Provide ADR training for the "dispute resolution specialist" and other key agency representatives on a regular basis.
4. Review agency standard contracts to determine whether they can be amended to encourage ADR use.

In addition to mandating the program requirements listed above, the Act authorized parties to enter into binding arbitration, so long as agency heads retained the authority to vacate an arbitrator's decision within 30 days.[Ref.1, pg. VI] Parties were also permitted to restrict the arbitrator's decision to a pre-determined range of outcomes. The ADRA 1990 also sought to balance the needs of confidentiality with the openness required in Government. The Act stated that "a neutral in a dispute resolution proceeding shall not voluntarily disclose ...any information concerning dispute resolution communications..." unless all parties agree to the disclosure.[Ref. 37, Sec.3(a)] The Act extended protection

for communications involving both public and private neutrals. All formal and informal documentation produced as a result of the ADR is considered inadmissible in court if the ADR technique is unsuccessful in resolving the dispute.

Finally, the Act addressed Government agencies' authority to procure the services of neutrals.[Ref. 32, pg. 1] Government agencies are now authorized to contract for the services of both public and private neutrals. The Act also authorizes agencies to utilize the services of other agencies to act as neutrals with or without reimbursement. For example, the Department of the Navy can now request the neutral services of a General Services Administration Board of Contract Appeals (GSBCA) judge to hear a case normally heard by an Armed Services Board of Contract Appeals (ASBCA) judge. This authority permits agencies to use the services of the neutral it believes is best suited for the dispute.

Although the ADRA 1990 helped focus agencies on ADR by requiring appointment of Agency ADR specialists, the survey conducted by the researcher revealed that the Act had limited impact on ADR process. A Government official surveyed commented that "no regulation [including the ADRA 1990 and ADRA 1996] can compel litigants to avail themselves of the ADR process".

D. FEDERAL ACQUISITION STREAMLINING ACT OF 1994

In order to improve the efficiency of Government contracting, Congress enacted the Federal Acquisition Streamlining Act (FASA) in 1994 . Among its many provisions, the Act stressed the importance of ADR as a means of contract dispute resolution. FASA extended the Administrative Dispute Resolution Act's sunset date to 1999 insofar

as it applies to contract claims.[Ref. 1, VII] This extension encouraged continued usage of ADR until the passage of more permanent ADR legislation. Key provisions of FASA impacting ADR include:[Ref. 41, pg. 5]

1. Provides agencies with authority to obtain the services of a neutral without competition, enabling parties to react quickly once it is agreed that ADR will be attempted.

2. Permits parties to utilize a board neutrals who otherwise would have jurisdiction over the dispute or select from a pool of Federal mediators. Like the ADRA 1990, this provision encourages parties to select the best neutral for a given dispute.

3. Requires a party to explain any decision to reject another party's request for ADR. The purpose of this provision is to force a party to explain to the Board and the other party why it is unwilling to engage in ADR to resolve a dispute.

Like ADRA 1990, most people surveyed by the researcher stated that FASA has had limited impact on the use of ADR. However, a few survey participants commented that FASA's requirement for the Contracting Officer to respond in writing when they reject a contractor's request for ADR will further prevent arbitrary decisions by the Contracting Officer.

E. ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

Following the success of the ADRA 1990 and the need for permanent legislation, the Administrative Dispute Resolution Act of 1996 (ADRA 1996) was passed to reinforce "Congress' interest in and recognition of the potential benefits of alternative dispute techniques".[Ref. 14] The Act refined and made permanent most of the provisions in the original Act. Although the new ADRA left most provisions unchanged, it did alter the ADRA 1990 in the following manner:[Ref. 41, pg. 5]

1. Eliminated the Government's right to escape unfavorable arbitration decisions. Previously, the Government could 'opt' out of binding arbitration decisions. Many believe that the elimination of the escape clause will encourage private parties to enter into binding arbitration more often.

2. Required agencies to formalize in writing arbitration's use to prevent them from trying to back out of the process midway.

3. Protected all communications between neutrals and parties from disclosure under the Freedom of Information Act (FOIA). Prior to the ADRA 1996, communications could be disclosed publicly in some circumstances under FOIA.

4. Provided further clarification of an agency's ability to contract for neutrals.

5. Removed special certification requirements for claims that did not exceed $ 100,000 in ADR proceedings, thereby simplifying the ADR process.

F. FEDERAL ACQUISITION REGULATION

In order to implement the ADRA 1990 and 1996, the Federal Acquisition Regulation (FAR) states that it is "the Government's policy to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level".[Ref. 19, Sec. 33.204] In supporting this policy, the FAR authorizes Contracting Officers, within their authority "...to decide or resolve all claims arising under or relating to a contract...."[Ref. 19, Sec.33.210] The FAR also encourages Contracting Officers to use ADR to the maximum extent practicable to all or a portion of a claim. The FAR also lists essential elements for using ADR techniques:[Ref. 19, Sec. 33.214]

1. Existence of an issue in controversy.

2. A voluntary election by both parties to participate in the ADR process.

3. An agreement on alternate procedures and terms to be used in lieu of formal litigation.

4. Participation in the process by officials of both parties who have the authority to resolve the dispute.

5. Certification by the contractor of a claim where necessary.

Other major FAR provisions pertaining to ADR include authorization to use neutrals, a requirement that the Contracting officer provide a written explanation for the rejection of a contractor's request for ADR, and factors that may make the use of ADR inappropriate.[Ref. 19, Sec.33.214] In addition, the FAR provides detailed "procedures and requirements for asserting and resolving claims" subject to the Contract Disputes Act of 1978.[Ref. 19, Sec.33.202]

G. DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT

Unlike the FAR, the Defense Federal Acquisition Regulation Supplement (DFARS) does not directly discuss the use of ADR within the Department of Defense. However, the DFARS does discuss the Armed Services Board of Contract Appeals' (ASBCA) authority to hear appeals, their jurisdiction to consider appeals, and the appeals process.[Ref. 10, Sec. 233.2 and Appx. A.] The DFARS also re-emphasizes certification requirements for claims under the Contract Disputes Act of 1978.

H. EXECUTIVE ORDERS 12979 AND 12988

Within the past three years, two Executive Orders have been issued that relate to the use of ADR. The first of these, Executive Order 12979, signed on 25 October 1995, targeted ADR as a favored settlement device with respect to protests. The Order encouraged agencies "to provide for inexpensive, informal, procedurally simple and

expeditious resolution of protests, including...the use of alternative dispute resolution techniques"[Ref. 4, pg.3] Where early legislation including the Contract Disputes Act, ADRA 1990, and ADRA 1996, had only addressed disputes; Executive Order 12979 was the first piece of legislation aimed at addressing protests by unsuccessful offerors. The Order also tasked the Office of Federal Procurement Policy (OFPP) with providing policy guidance for Government agencies. To date, OFPP has not issued any policy guidance regarding ADR.

The second order, Executive Order 12988, signed in February 1996, urged Government counsel to make every attempt to settle disputes before pursuing litigation. The Order stated that "whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding".[Ref. 14, pg. 2] It further stated "where the benefits of alternative dispute resolution may be derived...litigation counsel should suggest the use of an appropriate ADR technique to the parties".[Ref. 14, pg.2] Both Executive Orders 12988 and 12979 are strong endorsements by the President to use ADR whenever feasible.

I. ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

When parties consider using ADR to resolve a contract dispute, it is important to consider both its advantages and disadvantages. ADR provides a number of advantages over traditional litigation which include the following:[Ref. 4, pg.5]

1. Provides expedited resolution of a dispute. Many cases can be resolved using ADR within weeks or months after a dispute arises versus many months or even years using formal litigation.

2. Saves both the Government and the contractor significant amounts of money. The short duration of ADR proceedings and limitations on discovery and motions save both parties money in terms of legal fees and management involvement.

3. Preserves confidentiality. ADR maintains confidentiality in disputes involving highly sensitive corporate information or in situations where the news of the dispute may bring adverse publicity to either party.

4. Preserves on-going business relationships. Since ADR is less adversarial than litigation, parties are usually able to work together once the dispute is resolved.

5. Avoids program delays that occur due to protracted litigation. With expedited dispute resolution, parties are able to re-focus their efforts on the program sooner.

6. Shifts the focus of decision making from judges and lawyers to business professionals. In most forms of ADR, senior management principals maintain decision making authority over the dispute.

7. Forces both parties to communicate. After a dispute has gone on for awhile without resolution, parties often become so entrenched in their opinions that they are unwilling to carry on negotiations with the other party. ADR requires open and direct communications, which are often facilitated by the use of a third party neutral. Communications facilitated by a neutral can also help break an impasse that may arise during disputes.

8. Allows complicated issues and facts to be analyzed by experts and senior management instead of non-expert juries.

9. Enhances the "buy-in" by both parties to a possible solution.

10. Supports current policy and preserves the perception that the Government is a fair buyer

J. DISADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

Despite its many advantages, ADR has several disadvantages that may prevent parties from using ADR to resolve a contract dispute. ADR's disadvantages include the following:[Ref. 4. Pg.5]

1. ADR can not be used to set precedence. In order to set a precedence, a dispute would have to be heard by the Court of Claims or a Board of Contract Appeals.

2. With the exception of binding arbitration, ADR is not binding on either party until negotiations are successfully concluded and an agreement is signed. Either party can withdraw from an ADR proceeding at any time.

3. Settlement by senior level principals may be subject to second guessing by auditors and other senior management.

4. In the case of Government contracting, successful ADR can accelerate the need for settlement funding from current year's funds in order to repay the Judgment Fund. In most programs, contingency funding is not readily available.

5. ADR requires a heavy investment of senior management's time. Preparations leading up to and involvement of senior management as principals during ADR proceedings consumes enormous amounts of time.

K. INCREASED USAGE OF ALTERNATIVE DISPUTE RESOLUTION

1. Reasons For Increased Usage of ADR

Over the past decade, ADR has been increasingly utilized to settle a wide range of Government contract disputes including requests for equitable adjustments, inspection and acceptance issues, default determinations, and bid protests.[Ref. 4, pg.8] Based on a survey conducted by the researcher, Agencies' increased usage of ADR can be traced to a variety of reasons, foremost of which is the realization of parties to see the savings of time and money that ADR provides. A second reason for increased usage is the growing volume of statutes, regulations, and Executive Orders recently promulgated that strongly encourage that ADR be used to the maximum extent possible. Such acts as the ADRA 1990 and 1996 mandated that each agency establish its own ADR policy, conduct regular

training for ADR specialists, and assign a senior level representative as Dispute Resolution Specialist.

The third explanation for the increased emphasis on the use of ADR is due to the increasing number of Governmental and professional organization papers and seminars extolling the advantages and success stories of ADR. For example, numerous articles and seminars pertaining to ADR are sponsored by groups such as the American Bar Association and the National Contract Management Association. Another reason for ADR's rise in prominence is due to the growing number of agencies, contractors, and attorneys who have had positive experiences using ADR. If a dispute resolution technique is used and both parties believe it successfully resolved their dispute, they will be more willing to enter into ADR again in future disputes.

As agencies and clients have become more familiar with ADR, the anxiety over the misperception that ADR is a "process without rules or procedures" lessens.[Ref. 21, pg. 3] As Government and private counsel learn the rules and procedures, they are less intimidated by the process and become more willing to recommend its use. Another reason for the rise in ADR usage is due to the incorporation of ADR clauses in agencies' contracts. These clauses establish a partnering process, commit the parties to try to resolve all disputes through negotiations, and encourage the use of non-binding ADR techniques if negotiations should fail.[Ref. 30, pg.6] ADR clauses foster early ADR usage and help to minimize the financial impact of future contract disputes.

A final explanation for ADR's increased usage in Government contract disputes is the promotion of ADR by the Board of Contract Appeals. Many BCA judges emphasize the option of using ADR during the pre-hearing conference with the parties in dispute.

Parties often become enthusiastic about ADR's ability to save time and effort, and how it can provide a "swift and informal resolution of the dispute".[Ref. 21, pg. 4] In a 1996 survey of BCA judges' attitudes toward ADR, "over 85 percent (of judges) believe that encouraging the parties to engage in ADR should be an integral part of board proceedings".[Ref. 23, pg.3] This figure is a 15 percent increase over the number of BCA judges responding to the question in a 1994 survey.[Ref. 30, pg.7]

2. Statistics of ADR Success

Since the late 1980's, Government agencies, Boards of Contract Appeals, and private industry have experienced increases in the successful use of ADR. For example, since the early 1990's, the Department of the Air Force "has attempted to use ADR to resolve 65 contractual issues in controversy and has achieved a resolution rate of 96 percent".[Ref. 30, pg.7] A Government ADR Specialist surveyed by the author stated that the Departments of the Navy and Army have similar success rates, both exceeding 90 percent. Results from a 1996 survey of Board of Contract Appeals judges revealed that the overall success rate for non-binding ADRs was between 90 and 95 percent.[Ref. 23, pg.4] These results are comparable to the findings of the same survey conducted in 1994 which showed a success rate of approximately 95 percent.[Ref. 23, pg. 4] The General Services Administration Board of Contract Appeals (GSBCA) reports that since 1992, they have experienced a resolution rate of 84 percent.[Ref. 15, pg. 56]

For fiscal year 1994, the Armed Services Board of Contract Appeals (ASBCA) received 19 requests for ADR covering 29 appeals, while it received 31 requests covering 61 appeals in fiscal year 1995.[Ref. 23, pg.2] These figures show a 63 percent increase in

requests received and a 210 percent increase in the number of appeals between fiscal years 1994 and 1995. Although figures are not currently available for fiscal year 1996, a BCA judge commented that he expected fiscal year 1996 figures to be even higher.

The private sector has also seen an increased use of ADR to resolve contract disputes. Several private attorneys surveyed noted a significant increase in the requests for ADR from their clients. A few of these attorneys also commented that their firms had recently focused greater attention on ADR methods and techniques to advise clients during ADR proceedings. Other private organizations, including the American Bar Association, have also noted increased use and success of ADR. In one recent survey, the American Society of Civil Engineers, reported in 1994 that its dispute resolution board had heard 225 disputes and had resolved 208, for a resolution rate exceeding 92 percent.[Ref. 30, pg. 8]

L. SUMMARY

This chapter discussed recent legislation, regulations and Executive Orders impacting Governmental use of ADR. Specifically identified were the Contract Disputes Act of 1978, Administrative Dispute Resolution Acts from 1990 and 1996, the Federal Acquisition Streamlining Act of 1994, Executive Orders 12979 and 12988, and the Federal Acquisition Regulation. Some of the advantages and disadvantages of using ADR were identified and discussed. The chapter concluded with an overview of explanation for ADR's increased usage in both Government and in the private sector. Statistics were also cited showing agency resolution rates supporting ADR's ability to successfully resolve contract disputes. The next chapter will introduce the Mini-Trial, its background, and

factors for and against its use. The chapter will also explore its advantages and disadvantages and reasons for selecting alternatives to the Mini-Trial.

III. INTRODUCTION OF THE MINI-TRIAL

A. OVERVIEW OF THE MINI-TRIAL

The Mini-Trial is the most widely-used ADR procedure to resolve Government contractual issues in controversy.[Ref. 34] A Mini-Trial is not an actual trial. It is a structured voluntary settlement process that allows both parties to submit their cases to senior management principals who have authority to settle the dispute, or to a third party neutral who helps facilitate discussions between principals. Whether a third party neutral is involved or not, the principals are the only players who can resolve the issues at hand. The Mini-Trial allows for a shortened pre-trial preparation and abbreviated *best case* presentations by both parties.[Ref. 8, pg. 778]

Upon completion of the presentations, the principals attempt to negotiate a settlement, often with the assistance of a third party neutral. The neutral can fill a variety of roles, such as evaluator, facilitator, or mediator. The role played by the neutral is ultimately determined by the mutual desires of the parties. Like many other ADR techniques, the Mini-Trial is voluntary and non-binding; therefore a party can drop out of the process at any point if it so chooses.[Ref. 18, pg.1]

B. THE HISTORY OF THE MINI-TRIAL

Despite the Mini-Trial's recent rebirth as an ADR technique, its origins date back to World War II. During the war, the Bureau of Yards and Docks (later to be known as Naval Facilities Engineering Command, (NAVFAC)) established a Contract Award and Review Board, known as a Chief's Board.[Ref. 39, pg. 2] The board consisted of senior

engineering officers who's function it was to hear contractors' claims against the Government. The contractor's senior management, accompanied by legal counsel, would present their case, followed by Government counsel's opposing opinion, all in trial type setting.[Ref. 39, pg. 2] After hearing both parties' presentations, the Chief's Board would then attempt to negotiate a settlement with the contractor's senior management. If a settlement was not reached, the Contracting Officer would issue a final decision and the contractor's appeals would proceed to the courts. Although the Chief's Board was not successful in every dispute, the board was able to satisfactorily resolve many of the claims brought against the Bureau.

In recent years, the Mini-Trial concept has metamorphosed into a process where a third party neutral assists in the process but does not have a stake in the outcome as in the case of the Chief's Board. In addition to NAVFAC's use, the Army Corps of Engineers adopted the Mini-Trial as one of its primary dispute resolution techniques. The Corps has been able to resolve a multitude of large and complex construction claims using the Mini-Trial technique. As a result of their successes, the Corps has published several well-known Mini-Trial case studies, including the Tenn Tom Constructors and General Roofing Company cases, "...to encourage its managers to develop and utilize new ways of resolving disputes".[Ref. 45, inside cover] Due in part to the Corps' success with the Mini-Trial, a number of Governmental agencies and organizations, including the Departments of the Navy and Air Force, the Army Material Command, General Services Administration, and the Boards of Contract Appeals have adopted its use.[Ref. 4, pg. 8-9]

The use of the Mini-Trial is not solely reserved for Government use. A large number of companies including Allied Corporation, AT&T, Borden, Shell Oil, Standard

Oil of Indiana, Texaco, TRW, and Xerox have recently utilized the Mini-Trial.[Ref. 18, pg. 8] They have used it to resolve a variety of disputes including breaches of contract, construction claims, human resource disputes, international commercial disputes, and product liability cases. A recent survey of 114 companies showed that the Mini-Trial was the most frequently used method of ADR, employed over 38% of the time.[Ref. 18, pg. 8]

C. ADVANTAGES AND DISADVANTAGES OF THE MINI-TRIAL

1. Advantages of the Mini-Trial

As with any form of ADR, the Mini-Trial has a number of advantages that favor its use. The following advantages are found in the mini-trial technique:[Ref. 18, pg. 3]

a. Allows principals from both parties to make decisions. Any agreements that come out of the Mini-Trial process will be a joint decision made by the principals, not dictated terms from a third party arbitrator or judge.

b. Permits greater flexibility in final settlements. Instead of the "winner/loser" concept found in litigation, the parties can jointly decide on a variety of satisfactory outcomes where both sides can claim victory.

c. Allows for continued relationships. Because both parties play a role in the final outcome, they generally feel good about the decision and the opposing party. A "win-win" situation fosters continued working relationships.

d. Allows for significant cost and time savings. Major litigation can take months or even years, which translates into enormous legal fees. Mini-trials limit the time for discovery, presentations, and the number of key witnesses, thereby, reducing the cost involved in resolving the dispute.

e. Focuses both parties on *best case* presentations. Since the length of presentations and number of exhibits are often limited, the Mini-Trial forces parties to present their strongest arguments up front.

f. Allows for candid communications.[Ref. 20] Due to its informal, non-litigative environment and confidentiality, parties often feel more comfortable in openly

discussing issues and possible solutions that would not have been discussed in formal litigation.

g. Reduces the time Management spends focusing on the dispute. Time is money in the business world and senior management devotes far less time preparing and participating in a mini-trial compared with a dispute that goes to court.

h. Clarifies key issues or removes lesser issues prior to formal litigation even if the dispute is not resolved. It also allows legal counsel an opportunity to test their case and to discover which arguments are more persuasive, which can actually strengthen their case should they need to go to court.[Ref. 18, pg. 10]

2. Disadvantages of the Mini-Trial

Despite its advantages, the Mini-Trial has several limitations when compared with other forms of ADR, including the following:[Ref. 35, pg. 2]

a. The Mini-Trial is one of the most time consuming and costly ADR methods; however it is far less time consuming when compared to formal litigation.

b. Since Mini-Trials are not performed in a court of law, there is no protection against parties making false or misleading statements. This drawback is present in most ADR settings and most attorneys are capable of protecting their clients from misleading statements. Informal cross-examinations and rebuttals by parties in the Mini-Trial process also help protect against misleading statements.

c. Second guessing of the principal's decision can be a problem since few members of his organization are actually present. The principal makes the best decision based on *both* parties' cases. More than a few principals have been accused of "giving away the store" during the mini-trial. If Senior Management has confidence in their principal's ability, this should not be a major problem.

d. The principal's decision can have a demoralizing effect on lower levels of management.[Ref. 39, pg. 2] Since lower management was not part of the final decision, they may feel that the principal gave the dispute only a brief, cursory review prior to settling. This possible resentment by lower management can be overcome by providing a tactful debrief that explains the reasoning and rationale for the decision.

e. The Mini-Trial can tie up inordinate amounts of Senior Management's time. Although the Mini-trial is relatively short in duration, intensive preparations and the actual trial will absorb most of the senior manager's valuable time.

D. FACTORS FOR AND AGAINST THE USE OF THE MINI-TRIAL

No one ADR technique can resolve all contract dispute cases, however, ADR and the Mini-Trial can settle cases that do not belong in formal litigation. The following lists highlight factors in favor and against the use of the Mini-Trial:[Ref. 35, pg. 2]

1. Factors For the Use of the Mini-Trial

a. Parties are interested in resolving the dispute but personality conflicts stand in the way.

b. The case is primarily factual in nature (in a well-settled area of the law).

c. Parties want to retain control over the final outcome, versus having the court system decide the issue.

d. A fairly clear entitlement to consideration exists, and the primary task is to negotiate the quantum or amount of the award.

e. Parties desire to have a continuing relationship exist. It often makes more sense for parties to continue doing business with each other for the next 10 years rather than severing the relationship and suffering the cost and disruption of litigation.[Ref. 50, pg. C4]

f. Parties or their legal counsels have unrealistic views of their positions and a third party neutral's appraisal might dislodge the obstinate parties. This is particularly applicable when the third party neutral is a technical expert who might provide beneficial independent analysis.

g. The Mini-Trial can speed up the settlement process by concentrating parties on the key issues needed to resolve the dispute.

h. Parties seek to avoid possible media exposure (privacy is a premium).

i. The dispute involves a relatively small amount of money. A serious threat exists for costs to approach or exceed the amount of the dispute if the case

goes to the Board or courts. However, the Mini-Trial is not necessarily limited to small dollar disputes and has been used to resolve multi-million dollar cases.

j. If the contract includes an ADR clause, companies are more willing to try to resolve the dispute using the Mini-Trial or other ADR techniques rather than taking their dispute to the Board or courts.

k. Parties recognize some liability in the claim.

l. Senior management is willing to give their time and support for the process.

m. Parties have reached a negotiation impasse that may be overcome through the use of a third party neutral.

2. Factors Against the Use of the Mini-Trial

Although the Mini-Trial can be used to resolve a multitude of different contract disputes, it should not be employed in the following circumstances:[Ref. 35, pg. 2]

a. Any sort of fraud investigation is an immediate *show-stopper* if considering the Mini-Trial or other ADR technique.[Ref. 30, pg. 3] Situations involving fraud are best handled by the court system.

b. The Mini-Trial is not recommended when the dispute involves important legal or policy issues where establishing a precedent is desired. Despite its many advantages, the Mini-Trial and ADR can not establish legal precedence.

c. The Mini-Trial is being used as a stalling technique prior to litigation. All ADR techniques, including the Mini-Trial, require both sides to be honest and frank in discussions without any secret agendas or plans.

d. If the case is most likely to be resolved using unassisted negotiations, the Mini-Trial process is not necessary.

e. When parties or their counsels are particularly emotional, bellicose, and abusive, the chances for a successful Mini-Trial are significantly diminished. Although ADR does not require total cooperation, it is far more likely to be successful if parties can communicate and reason together.[Ref. 50, pg. C4]

f. If a delay will benefit one of the parties, the Mini-Trial and other ADR techniques are unlikely to be successful.

g. When a monetary imbalance exists between parties (when one party is substantially wealthier than the other), and the wealthier party believes it can wear down the opposition through costly legal battling, it will be difficult to convince the wealthy party to participate in a Mini-Trial.[Ref. 50, pg. C3]

h. Parties or legal counsels hold anti-ADR attitudes or are unwilling to see the benefits of ADR.

i. The case can be disposed of quicker through the use of an expedited Board of Contract Appeals or Court of Claims process.[Ref. 30, pg.4]

E. TIMING OF THE MINI-TRIAL

According to a Board of Contract Appeals judge surveyed by the researcher, the Mini-Trial can be used at any point of a contract dispute – prior to a Contracting Officer's final decision (COFD), before a Board or Court hearing, and occasionally, during litigation. One of the biggest challenges confronting Contracting Officers and legal counsel is determining at what point of a dispute the Mini-Trial should be used. The most obvious answer to this question is the "earlier the better". This answer follows the reasoning that the sooner the Mini-Trial is undertaken, the greater the savings of time and money. In addition, earlier use of the Mini-Trial may allow the parties to settle a dispute before developing an adversarial mentality towards each other. Although there is a great deal of truth to these "early" Mini-Trial justifications, there are other considerations that suggest that later usage of the Mini-Trial could be more advantageous.

For a Mini-Trial to be effective, all basic facts and issues must be defined. In order to establish these facts, a certain amount of discovery and investigation must take place for the parties to be adequately prepared for the presentations and the follow-on negotiations. If a Mini-Trial is attempted without some discovery and investigation, neither party would have a good understanding of their position or the position of the opposing party.

Numerous Government officials surveyed by the author commented that the Mini-Trial should be considered only after both parties have made necessary preparations.

Another consideration prior to using the Mini-Trial is the cost and time involved in preparations. Compared with other ADR techniques such as Mediation and Negotiation, the Mini-Trial requires a great deal more preparation time, expenditure of man-hours, and expense.[Ref. 39, pg. 4] A Mini-Trial should not be used as the initial effort to resolve a dispute but later in the dispute process after parties have expended a significant amount of preparation effort and have exhausted more simple ADR avenues. However, it is important not to wait too long in the dispute process to use the Mini-Trial. A general consensus of people surveyed by the researcher revealed that the longer parties delay, the more entrenched they will become in their positions and the less willing they will be to work together towards resolving the problem.

The most effective time to propose a Mini-Trial is just before the Contracting Officer reaches a final decision or, if already pursuing litigation, early in the discovery process, and before there are significant litigation costs.[Ref. 18, pg. 10] Delaying the use of the Mini-Trial until later in the dispute process accommodates the need for some amount of discovery and investigation. Several Government officials surveyed by the researcher agreed that the its use should be delayed and that the Mini-Trial should not be used as a "first resort" resolution technique.

F. COMMON REASONS FOR CHOOSING OTHER ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

The most cited reason for choosing another form of ADR over the Mini-Trial is that the Mini-Trial is simply more complicated and time consuming than is necessary to resolve many disputes. When factual issues are easily understood and do not require more detailed presentations by witnesses, more simple forms of ADR, such as Mediation and Assisted Negotiations, are more appropriate. For example, Mediation is often chosen because it provides both facilitation and evaluation by a neutral, but occurs in a less formal atmosphere. A Government counsel surveyed by the author noted that "when compared with other forms of ADR, the Mini-Trial is frequently viewed as being very high on the formality scale...just short of formal litigation".

Another reason for not selecting the Mini-Trial is that both parties may want to pursue a binding resolution which the Mini-Trial does not produce. After a contract dispute has gone on for a considerable amount of time, parties often seek to find finality of the issue and agree to a Board of Contract Appeals (BCA) Summary Trial or binding Arbitration. Both of these ADR techniques involve an abbreviated presentation to a third party who has the authority to render a binding decision. The Summary Trial also can be used when a question of law is involved. In other cases, parties with good working relationships may be more comfortable with other dispute resolution techniques such as unassisted negotiations. One BCA judge surveyed by the author commented that unassisted negotiations had been utilized in "...approximately a dozen of these [cases] with all but two resulting in a settlement".

Other reasons cited for not choosing the Mini-Trial include: lack of familiarity with the Mini-Trial, parties only interested in neutral evaluation or fact-finding, excessive preparation costs, issues that are too insignificant to warrant a Mini-Trial's preparation, and one side's inability to find a suitable senior management principal. Of particular interest, one former Government employee stated that senior Government managers often choose other forms of ADR that allow "someone else" (a judge or arbitrator) to make the decision so that "higher-ups can buy into the decision without risking their careers".

G. SUMMARY

This chapter introduced the ADR technique known as the Mini-Trial and briefly discussed its evolution within Government contracting. The Mini-Trial's advantages and disadvantages, as well as factors for and against its use were examined in detail. The chapter also explored the timing at which a Mini-Trial should be utilized and a number of the most common reasons for selecting alternative dispute resolution techniques other than the Mini-Trial. The next chapter will analyze in detail the major players and format of the Mini-Trial.

IV. KEY ELEMENTS OF THE MINI-TRIAL

A. INTRODUCTION

No two Mini-Trials are organized exactly the same. Their format, scope, and timing are all determined by the parties involved in the dispute.[Ref. 18, pg. 1] Despite its uniquely tailored structure, most Mini-Trials include the following events:[Ref. 18, pg. 9]

1. Initiating the Mini-Trial process.
2. Selecting Management principals.
3. Selecting a neutral third party.
4. Agreeing to the format and rules of the Mini-Trial.
5. Conducting some amount of discovery.
6. Exchanging position papers.
7. Presenting both parties' case at the Mini-Trial.
8. Negotiating by Management Principals.
9. Documenting any agreement reached.

This chapter will discuss in detail each of these Mini-Trial events.

B. EVALUATING THE POSSIBLE USE OF THE MINI-TRIAL

Either party involved in a contract dispute can recommend the usage of the Mini-Trial to resolve their differences. The suggestion to use the Mini-Trial most often comes from the attorneys representing parties.[Ref. 18, pg. 10] However, an increasing number of clients are now suggesting the use of the Mini-Trial due to greater awareness of the technique and its advantages over litigation.[Ref. 21, pg. 3] Within the Army Corps of

Engineers, senior Corps managers often discuss the Mini-Trial option directly with the Chief Executive Officer (CEO) of the contractor involved in the dispute.[Ref. 18, pg. 11] The Corps' managers believe that senior managers are practical people who are more than capable of resolving their differences.

During pre-conference hearings, many Board of Contract Appeals judges, including judges serving on the Armed Services Board, the Engineering Board, and the General Services Administration Board, emphasize that parties have the option of using ADR (to include the use of the Mini-Trial) to resolve their differences.[Ref. 21, pg. 4] One of the Board of Contract Appeals judges surveyed by the researcher commented that when the ADR option is presented to parties, they are often "enthusiastic about suggestions that might save time and effort and promote a swift, informal resolution of the dispute."

Regardless of whether or not a dispute has been filed with a Board of Contract Appeals, both parties must voluntarily agree to use the Mini-Trial.[Ref. 18, pg. 2] In cases filed with a Board of Contract Appeals, both parties "shall jointly request the ADR in writing" with the Board's clerk.[Ref. 21, pg. 4]

C. SELECTING AND PREPARING PRINCIPALS

1. Selecting a Principal

According to the Army Corps of Engineers, the first of two basic criteria for selection of senior management principals is that the principal should not have any prior involvement in the dispute.[Ref. 18, pg. 12] The rationale behind this first criterion is that prior involvement may bias the principal against objectively evaluating *both* parties

presentations. If the principal can not objectively evaluate the presentation, he will most likely be unable to agree on a compromise settlement.

The second criterion is that the principal have the authority to bind his organization by his decision.[Ref. 18, pg. 12] If a principal lacks the necessary authority, any agreement he reaches will be only tentative and subject to being overruled by more senior management. The Mini-Trial will only work if both sides know the other's principal "can make decisions that will count."[Ref. 18, pg. 12]

2. Analysis

Based on this research, the Corps' basic criteria for selecting principals appear sound. The use of principals from upper management with requisite authority and without negative pre-dispositions eliminates biases that can impede resolution. However, the researcher believes two additional criteria should be considered. The first of these is the amount of time the potential principal has available to devote to the case. If a principal has limited amounts of time to prepare for the case or is subject to be called away midway through the Mini-Trial, he should not be considered as a potential candidate. The second consideration is the potential principal's personality. Several Mini-Trial success stories note the principal's personality as being one of the most important ingredients in a successful Mini-Trial. Traits often mentioned in these stories include a willingness to compromise, receptiveness to new alternatives, the ability to develop mutual trust and respect, and a good sense of humor. These traits can help set the tone for proceedings and help overcome difficulties encountered.

3. Preparation of the Principal

Ideally, the principal should be a subject matter expert so they are more able to understand both parties' positions.[Ref. 18, pg. 12] Unfortunately, this luxury is not always available and the principal must be thoroughly prepared to participate in the Mini-Trial. The principal should be thoroughly briefed on his party's position and *best points* arguments, the position and arguments of the opposition (obtained through the exchange of position papers), the monetary limits of his authority, and applicable points of law that may pertain to the dispute.[Ref. 39, pg. 7] A Government contracting official surveyed by the researcher stated that principals generally receive summary briefings from the attorney representing them and their lower level staff. They can also be briefed by expert witnesses on more complex technical issues. Another Government official surveyed noted that if sufficient time was not available to adequately brief the principal, the principal may be at a serious disadvantage during the Mini-Trial.

D. USE OF A THIRD PARTY NEUTRAL

1. Possible Roles For Neutrals

A neutral advisor has been utilized by the Army Corps of Engineers during every successful mini-trial, proving themselves invaluable.[Ref. 18, pg. 17] The idea behind using a neutral is to introduce an impartial opinion and an element of mediation into the mini-trial.[Ref. 39, pg. 1] Neutrals are often retired judges and lawyers with subject-matter expertise in the field of the dispute. Using a neutral can help overcome suspicion or animosity, provide a communication link between the parties, facilitate continued

conversation at impasses, and encourage the principals to take charge of the situation.[Ref. 18, pg. 12] In addition, several Government contracting officials surveyed by the researcher commented that suggestions coming from the neutral may also be viewed with more openness than suggestions coming from the opposing side. When paid, neutrals are usually compensated equally for their efforts by both parties.[Ref. 13, pg. 18]

The role of the neutral should be defined prior to the Mini-Trial.[Ref. 26, pg. 3] Neutrals serve at the will of the parties and can fill a variety of roles including the following:[Ref. 18, pg. 12]

a. Point out the strengths and weaknesses of each party's positions.

b. Advise how a judge and jury might interpret law or a party's position.

c. Suggest new ways of resolving the dispute or recommending unexplored settlements.

d. Facilitate discussion between parties.

e. Help establish the mini-trial agreement document and procedures.[Ref. 7, pg.24]

f. Clarify the worth of parties' claims and assist in negotiating quantum.

g. Deflate unreasonable claims and stubborn opinions.

h. Explain the rationale for a solution which makes it easier for both sides to buy-in to the solution because the rationale was proposed by one of the parties.

i. Engage in *ex parte* (private consultation) discussions with parties.[Ref. 21, pg. 9]

2. Survey Results For Neutral Roles

A survey conducted by the researcher asked what the most effective role for a third party neutral in a Mini-Trial should be. Three distinct groups were targeted: active

or retired judges of Boards of Contracting Appeals (BCA), Government attorneys and contracting personnel, and private attorneys. Of the BCA judges surveyed, the most effective roles were the following (in order):

a. Facilitate discussion/keep parties talking.

b. Evaluate the strengths and weaknesses of each party's position.

c. Ensure parties viewed the neutral as unbiased/had confidence in the neutral.

d. Ensure parties follow the agreed upon process.

Nearly every judge surveyed included the above roles as being important. Other effective roles for neutrals mentioned were: innovative thinking, maintaining a sense of humor, keeping parties focused on compromise, mediating if necessary during the post-presentation negotiations, and being a legal expert.

Unlike the BCA judges who were relatively consistent in their responses, private attorneys surveyed were not as unified in what they believed were the most effective roles for the neutral. The most common responses received were the following (in order):

a. Focusing parties on common ground/compromise.

b. Evaluate the strengths and weaknesses of each party's position.

c. Facilitate discussions/keep parties talking.

d. Acting as a mediator.

Private attorneys also recommended the following additional roles for neutrals: maintaining order and decorum, assisting in the structuring of the ADR agreement, acting as a sounding board for parties who wish to engage in *ex parte* discussions, maintaining/building confidence in the neutral's ability, and asking questions to draw out

responses. One innovative private attorney suggested that "if asked, [the neutral should] give a reasonable settlement (dollar) range to the parties". This would help narrow the differences between the parties and provide "buy-in" by the parties' respective senior management.

The Government attorneys and contracting personnel were more consistent in their responses to the survey, citing the following roles as the most important (in order):

a. Facilitating discussion/keeping parties talking.

b. Evaluating strengths and weaknesses of each party's position.

c. Providing legal interpretation.

d. Acting as a mediator.

Other recommendations included: forcing parties to be reasonable in negotiating, participating in *ex parte* discussions, building confidence in the neutral's ability, judging how a court might rule on the case as a whole, and assisting in the drafting of the ADR agreement. In addition, a Government ADR specialist commented that if a BCA judge is acting as the neutral, their "general authority as a judge is often useful in persuading the parties to continue negotiations where they otherwise might decide to terminate [the Mini-Trial]". Finally, another Government attorney with significant Mini-Trial experience stated that the neutral should "*only* [act] as a facilitator to keep things moving...the neutral should not be an evaluator because if evaluation was needed, we would use the Third Party Evaluation technique".

3. Analysis

Despite the wide range of responses received to the question, there is some consensus as to what the most effective roles of the neutral should be in a Mini-Trial. Most individuals surveyed agreed that the neutral should facilitate discussions, and evaluate the strengths and weaknesses of each side. A neutral facilitating discussions keeps parties talking and focused on the issues at hand. Since the neutral is (hopefully) viewed as unbiased, he is in a unique situation to objectively evaluate both parties' positions. After these two points, there is little agreement between the parties as to the most effective roles for the neutral.

Interestingly, the BCA judges surveyed were more concerned than other groups about following the ADR agreement and ensuring the neutral was viewed as unbiased. This is most likely because BCA judges, among the groups surveyed, are most often called upon to act as third party neutrals. As BCA judges, one of their many responsibilities is to ensure the appeals process is followed. In addition, every judge (or judge acting as an ADR neutral) wants to be viewed as unbiased; this quality is extremely important in order for a judge or neutral to be effective. Based on the survey results, the Government and private attorneys seem less concerned with the process and the neutral's bias and more concerned about the neutral's mediation skills.

After thorough analysis of the literature and survey results, it appears to the researcher that there are four primary roles that should be filled by a neutral during a Mini-Trial. The first of these is facilitating discussion. The neutral must keep the parties talking and focused on coming to an agreement. Even when parties are having difficulties communicating, the neutral's *ex parte* discussions with each party can assist in overcoming

potential impasses. If the parties fail to communicate, the Mini-Trial process is doomed to failure. The second role is evaluating the strengths and weaknesses of each party's position. It is common for parties to be so entrenched in *their* position that they can not objectively see the merits of the other party's position. The unbiased neutral can provide a "dose of reality" by pointing out both the strengths and weaknesses of each party. If the neutral is an active or retired BCA judge, he can also provide his opinion on the possible outcomes if the dispute were to go before the board or court. The third role that a neutral should fill is ensuring that he is perceived as being unbiased. Both parties must have faith in his sense of fairness, as well as his impartiality. If his bias is questioned, the neutral will cease to be effective. Although these three roles are crucial for a neutral to be successful, the most important role a neutral should fill is whatever role the parties need him to fulfill. If both parties agree to limit a neutral's participation to only facilitation, that is the only role he should fill. If the parties later want him to fill some other role, such as evaluation of strengths and weaknesses of each side's position, the Mini-Trial provides that flexibility. It is important for the neutral to always remember that he is serving at the will of the parties.

4. Choice of Neutrals

Once the parties have decided what role (or roles) they want the neutral to fulfill, they must jointly choose the neutral.[Ref. 31, pg. 27] Based on the Administrative Dispute Resolution Act of 1990, Government agencies are authorized to use the services of Government employees, employees of other Government agencies, and private persons to serve as neutrals.[Ref. 31, pg. 28] Government neutrals are most often active Board of

Contract Appeals (BCA) judges, however, they can also be Federal mediators, technical experts, or any other acceptable Government employees. Private neutrals are usually law professors with significant experience in the issue at hand or are former Board of Contract Appeals judges.[Ref. 18, pg. 12]

Choosing a Board of Contract Appeals judge as a Mini-Trial neutral offers a number of advantages over private neutrals, including the following:[Ref. 36, pg. 455-457]

a. Most judges have considerable experience and sound credentials.

b. A judge is recognized as an expert in handling Government contract disputes.

c. A judge who handles an ADR proceeding is disqualified from participating in any follow-on litigation should the ADR fail to resolve the dispute.

d. A judge would be able to advise parties if the issues presented did in fact contain an important precedential issue of law (if so, ADR should not be chosen).

e. Judges are familiar with positions that the Board has taken with respect to various issues.

f. Judges are highly cost-effective; in most Federal disputes, they are free.

Government and private attorneys surveyed by the researcher also added the following advantages for choosing BCA judges as neutrals: they have a lengthy public record of rulings available for analyzing, many have received extensive mediation and negotiation training, and they already have "good jobs" so they are less likely to be trying to use a ADR proceeding to build a reputation for future personal gain.

Despite the many advantages of using a BCA judge as a neutral, they pose several potential disadvantages compared with private neutrals. The same individuals surveyed above cited the following disadvantages:

a. Some judges do not know how to "take off their judge hat" and allow the parties to decide the issues.

b. Many judges have little or no ADR experience.

c. Some judges feel uncomfortable with the mediation and negotiation roles they will have to fill in ADR. Not all judges make good mediators because mediation requires different skills and perspectives.

d. One of the parties may view the BCA judge as biased based on their public record.

e. Some judges are viewed as less innovative and unwilling to embrace novel concepts.

No advantages to using a private neutral were found in the researcher's literature search, however, individuals surveyed by the researcher commented that private neutrals offer more innovative perspectives and better business judgment than BCA judges. In addition, one private attorney surveyed added that 'if selected on the basis of experience, reputation, and track record for success, [a private neutral] may prove to be an exceedingly effective neutral".

Even when considering their few advantages, private neutrals present several important disadvantages. Private neutrals can be very expensive, often charging thousands of dollars for their professional services.[Ref. 36, pg. 460] Several Government attorneys and surprisingly, a few private attorneys surveyed by the researcher noted that private neutrals can be perceived as being biased against the Government, especially "since the private sector is where their [private neutral's] 'bread is buttered'". Other disadvantages cited by individuals included a possible lack of familiarity with financial limitations on Federal agencies and lack of mediation training and unfamiliarity with ADR techniques.

5. Analysis

Based on analysis of the advantages and disadvantages for both active Board of Contract Appeals (BCA) judges and private neutrals, it appears to the researcher that active BCA judges may be the best choice for Mini-Trial neutrals. Judges are inexpensive, provide a wealth of experience resolving contract disputes, and have unquestionable credentials. Although private neutrals may have strong credentials, their mediation experience and knowledge of Federal contracting may be lacking. A judge's public record of previous decisions is readily available for scrutiny, allowing both parties to determine if the judge has any existing biases. A private neutral's record for resolving disputes may not be publicly available or clear.

Despite the perception of some small contractors that BCA judges are biased against business, most contractors who have dealt with BCA judges are familiar with their track record of relatively unbiased decisions. Even if a judge is believed to have a bias towards one side or another, either party can request another available judge. In the case of a private neutral, any bias the neutral may have will only be heard through the "grapevine" prior to trial, or discovered during the trial.

BCA judges resolve contract disputes regularly and maybe in the better position (than private neutrals) to predict the outcome of a dispute that has recently come before the board. Based on comments received from the survey, their ability to predict possible outcomes carries a great deal of weight with parties when a judge evaluates their position. Survey responses also suggest that a judge's stature also facilitates "buy-in" when possible solutions are recommended by the judge or are passed along by the judge. With the

exception of recently retired BCA judges acting as private neutrals, private neutrals may not have the same recent experience to accurately predict what decision a board may decide in a given case.

Despite the many advantages of using BCA judges as neutrals, private neutrals may be the best choice in some circumstances. Several survey participants stated that some judges are less innovative and unwilling to embrace novel concepts. If one of the parties is looking for an innovative solution to the dispute and believes private neutrals are more innovative than BCA judges, they may prefer having a private neutral. Furthermore, if the contractor has little experience with BCA judges, it may perceive a BCA judge as being "pro-Government." In this case, using a private neutral may remove the contractor's fear of the neutral being "pro-Government."

E. THE MINI-TRIAL AGREEMENT

1. Purpose and Recommendations For Drafting the Mini-Trial Agreement

The purpose of the Mini-Trial agreement is to establish the procedures to be followed during the discovery and hearing phases of the Mini-Trial.[Ref. 39, pg. 6] The parties will jointly formulate the agreement and tailor it to the needs of the parties.[Ref. 13, pg. 21] Parties drafting a Mini-Trial agreement should take into account the following recommendations:[Ref. 6, pg. 7]

a. Have a written agreement on the process, procedures, schedule, and termination of the Mini-Trial.

b. Decide on the role of the third party neutral and decide whether to permit parties to have communications with the neutral without the presence of the other party (i.e. *ex parte* discussions).

c. Decide whether, and the extent to which, to suspend litigation. Also determine if the suspension is indefinite or linked to a specific event or date.

d. Address what information or types of information and documents are to be provided. Also, address whether there will be any restriction placed on the use of the information and documents.

e. Include provisions to ensure the confidentiality of findings and documentation.

f. Address how the parties intend to obtain and, or, limit discovery and factual exchange.

g. Establish page and supporting documentation limits of each party's position paper. Describe how papers will be exchanged and if any written rebuttal to each party's position paper will be made. Determine if the neutral will be provided advanced copies of the parties' position papers and rebuttals.

h. Provide the name of each party's senior management principal, and the names of any technical, legal and business representatives. Determine if any limitations will be placed on the number of witnesses and representatives.

i. Determine at what point the principals should begin the post-presentation negotiation.

j. Make provisions and preparations for the execution of a bilateral contract modification at the conclusion of the Mini-Trial process.

If the parties have a need to add, delete, or change any element of the Mini-Trial agreement, they may mutually alter the agreement at any time. Examples of possible alterations can include changing the role of the neutral or page limitations on position papers.

2. Exchange of Position Papers

Position papers summarize the assertion of each party and are exchanged prior to the trial.[Ref. 18, pg. 14] The length, character, and due date of position papers generally

will be spelled out in the Mini-Trial agreement. Position papers vary in length, but are normally limited to 20-25 pages, keeping in mind the *best points* concept.[Ref. 18, pg. 14] The exchange of position papers reveals each party's strongest arguments for their respective position. The position papers should also reflect what information will be presented during the trial.[Ref. 26, pg. 4] Once the opposition's paper is received, each party can fine tune their presentation and arguments.

Another reason for the preparation of position papers is to pre-brief the neutral.[Ref. 21, pg. 9] One Board of Contract Appeals judge surveyed by the researcher noted that he always requests a copy of both sides' papers in order to get "up to speed" on the parties primary arguments. In addition, witness lists (if applicable) can also be exchanged with the position papers.[Ref. 48, pg. 23] The exchange of position papers shortens the length of the Mini-Trial by covering basic positions which will not need to be covered in detail during the trial presentations.

3. Mini-Trial Schedule

As noted above, the tailored schedule for the trial is documented in the Mini-Trial agreement. Although there is no standard format, most Mini-Trials follow the sample schedule listed below:[Ref. 18, pg. 15]

- Party A's opening remarks
- Party B's opening remarks
- Party A's presentation
- Party B's rebuttal (may include cross examination)

- Questions from principals (and neutral if allowed)
- Party B's presentation
- Party A's rebuttal (may include cross examination)
- Questions from principals (and neutral if allowed)
- Closing arguments from both parties
- Negotiations/discussions by principals (usually assisted by the neutral)

4. Best Points Arguments

The Mini-Trial agreement normally contains some language that commits both parties to present their *best points* or *case* and to negotiate in good faith.[Ref. 18, pg. 14] The term *best points* or *case* means that the parties will only focus on those issues that are the most important and relevant to resolving the dispute. Negotiating in good faith implies that both parties will attempt to make their best effort to come to a compromise agreement. It also implies that a party will not use the Mini-Trial as a 'stalling tactic' to gain some future advantage in court.[Ref. 18, pg. 14] Like the exchange of position papers, *best points* presentations are used to condense the presentations down to the minimum amount of time necessary.

5. Location of the Mini-Trial

Although not necessarily required, the Mini-Trial should be held in a location that is clearly neutral and not associated with either party.[Ref. 18, pg. 14] This measure is necessary to ensure that neither party can benefit in some way from the location. The trial should also be conducted away from the office so all parties can concentrate on the

Mini-Trial case without distractions.[Ref. 26, pg. 2] Visitors and interruptions due to other 'outside' business should be curtailed as much as possible. Both parties should be given adequate seating and tables to handle all exhibits and equipment. In addition, both parties should be provided with a private conference room for case preparation and discussions.[Ref. 26, pg. 2] Above all, an informal atmosphere should prevail; this will help both sides be comfortable and more relaxed.[Ref. 18, pg. 14]

6. Allocation of Expenses

In most cases, "all expenses such as the cost of the neutral advisor or the meeting facilities, are paid for on a 50/50 basis by the participants."[Ref. 18, pg. 15] Only under unusual circumstances will the Government bear more than half of the expenses.[Ref. 13, pg. 18] Although unusual circumstances occur infrequently, an example might be when the contractor can not afford to share his portion of the neutral's fee and the Government agrees to pay for the entire cost of the neutral. All costs associated with the preparation and presentation of the Mini-Trial are paid for by each individual party.[Ref. 18, pg. 15]

F. THE MINI-TRIAL HEARING

As discussed earlier, the trial will follow the schedule in the Mini-Trial agreement. Opening statements are made, "spelling out in outline form the premise of [each party's] case, the method to be used in proving your case and the fallacy of your opponent's case".[Ref. 26, pg. 4] Following opening remarks, parties can structure their presentations in any manner they desire, selecting among witnesses, documentary and demonstrative evidence, and audiovisual and exhibit presentations.[Ref. 39, pg. 8]

anyone within their organization to present their position. Survey participants noted that in disputes involving highly complex, technical issues, technical experts are often called upon to either present their party's position or supplement the information provided by attorney presenting the case. Due to concerns regarding confidentiality and/or distractions, parties may elect to limit the number of individuals participating in the Mini-Trial. Due to time limits normally placed on presentations, it is imperative that parties condense their arguments and presentations to fit within the time allotted. Presentation lengths vary depending on the number and complexity of the issues in dispute, as well as other outside events such as travel plans and pending litigation dates. Survey participants commented that presentation lengths vary widely, lasting anywhere from two hours to two days for each party's presentation.

Visual aids and exhibits can play a crucial role in presentations. As one BCA judge stated, "you only have one shot of probably three hours to convince someone of the validity of your position...visual presentations have great impact under these time constraints".[Ref. 26, pg. 4] Although there is a great deal of latitude given to each party in their presentations, "both attorneys need to be aware that for there to be any payment made by the Government, there must first be a legal basis for any costs, expenses, or injuries which are claimed".[Ref. 18, pg. 17] Testimony may be required by auditors to establish a legal basis.

Principals are usually free to ask questions of anyone participating in the trial in order to clarify their understanding of facts and opinions.[Ref. 16, pg. 8] Neutrals may also ask questions if authorized to under the terms of the Mini-Trial agreement. If time permits, cross examination may also be allowed if stated in the Mini-Trial agreement.

However, cross examination may not be effective under time and schedule constraints.[Ref. 26, pg. 5] Due to the flexibility of the Mini-Trial process, the parties can mutually change the format or the role of the neutral at any time during the trial if they believe it will help reach an agreement. Recesses or breaks may be necessary during lengthy presentations or if a party feels it needs to confer privately on an issue. After presentations are completed, parties conclude the trial with closing arguments. During a recent U.S. Army Material Command Mini-trial, the Army's closing arguments stressed not only its *best points* arguments, but also the risks of future litigation if the case was not settled.[Ref. 20, pg. 6]

G. POST-PRESENTATION NEGOTIATIONS

At the conclusion of the trial, the principals (occasionally accompanied by their lawyers) attempt to negotiate a settlement.[Ref. 12, pg.1] After absorbing both parties' arguments and positions, the principals have the opportunity to conduct face-to-face discussions. Although principals have final decision making authority, it is not uncommon for them to consult with their staffs during breaks in negotiations.[Ref. 26, pg. 5] Negotiations are usually kept informal and follow no set format or length.[Ref. 18, pg. 17] Once in the negotiation room, principals may conduct the negotiation any way they want, so long as it helps contribute to resolving the dispute.[Ref. 18, pg. 17] Principals can hear additional presentations on specific points if necessary.[Ref. 18, pg. 17] Negotiations can take as little as an hour, while other negotiations can last several sessions spread over several days.[Ref. 18, pg. 17]

Depending on the role of the neutral, he may or may not be a part of the negotiations.[Ref. 18, pg. 17] If included in the negotiation phase, the neutral can fill any role desired by both parties. Since the neutral is often a subject matter expert or has significant experience in resolving disputes, he will often be called upon to highlight major points made by both parties, provide objective analysis of opposing views, and make recommendations for possible settlements. Regardless of the role of the neutral, the principals are the only ones who have the authority to resolve the dispute.

During the negotiation phase of a Mini-Trial involving the U.S. Army Corps of Engineers and General Roofing Company, the parties chose to expand the role of the neutral beyond the original agreement.[Ref. 44] The parties allowed the neutral to evaluate each claim and the dispute as a whole and to speak with each party on an *ex parte* basis. The mutual expansion of the neutral's role is believed to have expedited negotiations, allowing each party to discuss each claim on its merit and quantum.

Another example of effective use *ex parte* discussions can be found in the Army's dispute with Goodyear Tire and Rubber Company.[Ref. 46] During negotiations, the neutral met individually with each party to discuss the issues and act as a sounding board for possible quantums. Realizing the parties were not far apart on the quantum, the neutral was able to bring the parties to a successful resolution.

H. DOCUMENTING THE SETTLEMENT AGREEMENT

Once a resolution has been reached through negotiations, the parties should promptly prepare a written agreement that documents the "key ingredients" of the settlement.[Ref. 4, pg. 11] Key ingredients include the dollar amount or quantum of the

settlement, the date settlement payment will be made, a concise description of what the parties agree to execute, and the impact of the settlement on on-going work. Prompt preparation of the settlement agreement will ensure that both sides know what was agreed upon in case there are later questions. In addition to prompt preparation, it is important that the intent of the formal agreement be documented in as much detail as possible.[Ref. 26, pg. 5] More often than not, the principals "will develop an agreement in principle, then request the attorneys to prepare more detailed agreements implementing the agreement."[Ref. 18, pg. 17]

I. SUMMARY

This chapter focused on initiating the use of the Mini-Trial, key aspects of the Mini-Trial agreement, the flow of the trial, negotiations, and documentation. The researcher also provided analysis of principal selection, the most effective roles played by the neutral, and which category of neutral is the best choice for Mini-Trials. The next chapter will explore and analyze issues surrounding the use of the Mini-trial including, possible reluctance to use the Mini-Trial within the Department of Defense, problems encountered with neutrals and principals, and the concept of an "unassisted" Mini-Trial.

V. ISSUES IN THE USE OF THE MINI-TRIAL

A. U.S. NAVY RELUCTANCE TO USE THE MINI-TRIAL

1. Survey Results

Based on the initial literature search on the use of the Mini-trial, the researcher found examples of the Navy's success with the Mini-Trial. However, most of these published success stories involving the Navy occurred during the mid to late 1980's, with only a few examples found after 1990. These initial findings led the researcher to question whether the U.S. Navy was reluctant to utilize the Mini-Trial when compared with the other Services. Unfortunately, there are no conclusive data available on each Services' use of the Mini-Trial. In order to determine if the Navy was reluctant to use the Mini-Trial, the researcher surveyed over thirty Board of Contract Appeals (BCA) judges, Department of Defense attorneys, and private attorneys. Several individuals surveyed were unable to address the question due to their limited knowledge of the Navy's ADR usage. Of those able to address the question, two were BCA judges, six were Government attorneys, and two were private attorneys.

Both BCA judges responding to the question stated that the Navy was *not* reluctant to use the Mini-Trial, and had used it extensively in past contract disputes. One judge commented that "when compared with the Army's Corps of Engineers, the Navy has not used the Mini-Trial as much...but not any less than the other Services." The judge also stated that he believed the Navy's usage of ADR had increased due to recent legislation promoting the use of ADR. Both judges agreed that all of the Services were choosing other forms of ADR over the Mini-Trial. The second judge said that most of the

Services (including the Navy) "have not rushed off to use the Mini-Trial" since other less complex forms of ADR are available.

For the most part, Government attorneys also agreed that the Navy has *not* been reluctant to use the Mini-Trial. Several attorneys from the Navy Litigation Office emphatically stated that the Navy was "eager to engage in ADR" and had actively used the Mini-Trial and ADR since the early 1980s. One Navy attorney surveyed stated that "the Navy used to use the Mini-Trial extensively but has now moved on to other less formal ADR methods such as Mediation". This greater propensity to use less formal techniques echoed earlier comments made by the BCA judges surveyed. Despite the Navy's apparent eagerness to participate in ADR, two Navy attorneys commented that recent problems involving a third party neutral had made the Navy "somewhat hesitant" to enter into Mini-Trial proceedings. Problems involving Mini-Trial neutrals will be discussed in greater detail later in this chapter. Of the six Government attorneys responding, only one believed the Navy was "not as eager to use ADR as [other Services] may have". However, the attorney noted that "if an activity had a very high number of claims and virtually no prospect of winning [the dispute], it would eagerly embrace ADR...fortunately, we [the Navy] are not in that position."

Of the two private attorneys responding to the question, one believed the Government (including the Navy) was "still reluctant to use ADR and the Mini-Trial despite the increased promotion of ADR" within the Government. Furthermore, he commented that the "Government shows interest [in the Mini-Trial and ADR], but [its] talk is cheap." The other attorney surveyed believed the Navy was not reluctant to use the Mini-Trial and utilized it just as much as the other Services.

2. Analysis

When the Mini-Trial first gained wide acceptance as an effective ADR technique in the early 1980s, it was used extensively by the Department of Defense. The researcher believes the Mini-Trial provided a 'familiar', more formal structure similar to traditional litigation. Attorneys felt comfortable with this technique and readily adopted it. However, once attorneys became more comfortable with other, less formal ADR techniques, such as Mediation and Negotiation, their reliance on the Mini-Trial diminished. It appears that this "diminished reliance" on the Mini-Trial is exactly what occurred within the Navy. The Navy used the Mini-Trial extensively during the 1980's as highlighted by the many success stories found by the researcher. However, its appears that its usage decreased as Navy attorneys became more familiar with less complex techniques. As one surveyed Navy attorney noted, "the Navy has used the Mini-Trial when it thought it was appropriate." Although the Navy uses the Mini-Trial infrequently, it was successfully used in resolving an $ 18 million dispute between the Naval Sea Systems Command and Westinghouse Electric Corporation in 1996.[Ref. 3] The researcher believes the Navy selectively chooses when to use the Mini-Trial and only uses the technique when its advantages can be best utilized.

It is also interesting to note that of the Government attorneys surveyed, only Navy attorneys from the Navy Litigation Office responded to the question.. Their partisan "bias" may account for their general consensus that the Navy has not been reluctant to use the Mini-Trial. Regardless of any possible bias by Navy attorneys, comments by the BCA judges and the private attorney surveyed further support the researcher's preliminary

conclusion that the Navy has not been reluctant to use the Mini-Trial. The researcher can only speculate as to why the other Government attorneys surveyed did not respond. It appears they had little insight about the Navy's use of the Mini-Trial. From conversations with numerous Government attorneys, the researcher discovered that other Services and Federal agencies were generally unfamiliar with the Navy's experience with the Mini-Trial.

B. PROBLEMS ENCOUNTERED WITH NEUTRALS

1. Survey Results

Although the guiding role of a third party neutral is to assist the parties in resolving the dispute, the neutral can sometimes be a source of problems during the Mini-Trial proceeding. The researcher's survey included a question regarding the problems encountered with neutrals. Unlike the low response rate received to the previous question concerning the perceived reluctance of the Navy to use the Mini-Trial, nearly every Board of Contract Appeals (BCA) judge and Government and private attorney surveyed commented on problems they had heard of or had personally encountered.

The number one problem with neutrals cited by BCA judges was the cost involved in hiring a neutral. Since BCA judges acting as neutrals are provided free of charge, the judges surveyed were primarily referring to the expense encountered with hiring a private neutral. Since private neutrals can charge upwards of $ 200 per hour, services for a neutral can easily exceed $ 8,000 per week. Even though this cost is usually split 50-50 with the contractor, this cost still must be paid for out of current fiscal year's funding which is often limited. The judges also mentioned that the cost for a neutral could be "cost prohibitive" if the total dollar value of the dispute was small. An example of cost

prohibitive would be paying $ 8,000 for a private neutral when the total amount of the dispute was only $ 50,000. Other problems with neutrals noted by the judges included not accepting their role as a neutral (as outlined in the agreement), losing their objectivity by not allowing the parties to resolve the dispute themselves, and the lack of appreciation for the role of the evaluative mediator. Some neutrals feel so compelled to resolve the dispute, that they occasionally try to participate more than the parties originally intended. This can cause frustration for the parties who are not only trying to resolve the dispute, but are also forced to keep the neutral within his original role. Occasionally, a neutral can lose his objectivity after hearing both parties' positions. This may lead the neutral to unknowingly influence the dispute's outcome in favor of the party he sides with. If tasked by the parties, a neutral might also have a problem with providing an objective evaluation of the parties' positions. Unlike BCA judges who are regularly called upon to evaluate parties' positions, some neutrals may not feel comfortable evaluating parties' positions.

Private attorneys surveyed noted that their greatest problem with neutrals during Mini-Trials was that the neutral did not have adequate knowledge of Government contracting and was unfamiliar with settlement funding options available to the Government. A neutral's lack of familiarity with Government contracting forced the parties to spend valuable time educating the neutral; time that should have been spent resolving the dispute. By not understanding settlement options available to the Government, neutrals were often times recommending possible solutions that were not feasible or even legal. Other problems with neutrals noted by the private attorneys included lack of impartiality, the limited number of qualified neutrals available, and the cost of the neutral if time limits were not placed on their participation. A neutral can lose

his impartiality if he is biased against one party's position. As discussed earlier, this may lead the neutral to influence the decision in favor of the party he sides with. The private attorney's concern with the cost of neutral is well founded. If no time limits are placed on a private neutral's participation, the neutral could spend unnecessary time "milking the clock" in order to receive a greater fee. Time limitations places a cap on the total cost of the neutral.

Concern over the neutral's bias was the number one problem with neutrals cited by Government attorneys surveyed. Furthermore, over 75 percent of Government attorneys surveyed said that neutrals tended to be more pro-contractor than pro-Government. The second largest response received was the neutral overstepping his role in the Mini-Trial, followed by the expense of the neutral and lack of familiarity with Government contracting. Examples of a neutral overstepping his role may be providing evaluation of the parties' position without being asked to or attempting to facilitate negotiations when his assistance is not necessary. Other problems with neutrals cited by the Government attorneys included BCA judges who acted more like "judges, than facilitators and mediators, and neutrals pressuring the parties to resolve the dispute to boost up their own "track record" as a neutral.

2. Analysis

After reviewing the responses, all three groups expressed concern over the impartiality and cost of the neutral. The reason for consensus on the impartiality of the neutral can be found in the fundamental role of the neutral. The neutral is supposed to provide unbiased assistance to help resolve the dispute. If a neutral had a perceived bias

towards one of the parties, the other party would lose faith in the neutral's ability to objectively assess the strengths and weaknesses of each party and would question any resolution recommended by the neutral. Although most BCA judges believe that they are impartial, they do see the need for both parties to perceive them as being fair and objective. One would expect that by nature of their role, attorneys are biased towards their party's position, however, they realize their party can succeed only if the neutral gives each party the same opportunity. In addition, some attorneys may also harbor negative views towards the use of ADR and blame the neutral's impartiality as the reason for any problems that may occur during the trial.

The consensus regarding the cost of neutrals found that both parties are always concerned with the costs of resolving the dispute. If there is a fee associated with the neutral (as in the case of a private neutral), both parties will want to minimize that expense. Every dollar spent on neutral fees reduces a corporation's profits and the already tight balance of the Government settlement fund. Since BCA neutrals are free, there is a natural tendency to use a BCA judge over a private neutral. The most common comment stated "why should you pay for a neutral when you can get one for free."

Beyond concern over impartiality and cost, there was no further consensus among all three groups. Two of the three groups, the BCA judges and the Government attorneys, were concerned with the neutral overstepping his role. Most of the Government attorneys surveyed were Navy attorneys. Of these, most were familiar with problems the Navy has recently had with a few Mini-Trial neutrals (both BCA and private neutrals) who had overstepped their authority. These recent problems most likely tainted their responses. Unfortunately, some neutrals are more concerned about trying to resolve

the dispute to bolster their "career record" rather than looking out for both sides' best interests.

Most of the BCA judges surveyed were also familiar with the Navy's recent problems. This may account for why they responded the same way to the question. In addition, many BCA judges are willing to admit that they occasionally have difficulty "taking their judges hat off" and may have inadvertently overstepped their own role as a neutral some time in the past. Surprisingly, the private attorneys surveyed did not mention the neutral overstepping his role as a concern. This may be due to the limited number of Mini-Trials in which those attorneys had participated. Most of the private attorneys surveyed had only one or two experiences with the Mini-Trial.

Another explanation for the concern over the neutral stepping outside his role may be due to an entirely different reason. As discussed previously, the role of the neutral is usually defined by the parties in the Mini-Trial agreement. However, some parties may be unsure as to what role they want the neutral to fill and fail to adequately define the role of the neutral in the agreement. If his role is vaguely defined, the neutral may well interpret his role in any manner he wants, which may not be to the liking of the parties. Consequently, Government attorneys and BCA judges may be concerned about this "overstepping" because the attorneys who draft agreements may have failed to adequately define the role of the neutral.

Both Government and private attorneys were concerned with the neutral's lack of understanding of Government contracting. The reason for this may well be that when a neutral is not well-versed in Government contracting, the attorneys are often called upon to educate the neutral. Since this inevitably slows the Mini-Trial process down and

interrupts the presentations (which are usually made by the attorneys), attorneys would prefer having a neutral who has considerable knowledge of the Government contracting process. This is another reason for using a BCA judge as a neutral. Since a BCA judge has considerable knowledge of Government contracting, an attorney does not have to spend time "educating" a BCA judge.

One of the problems with neutrals cited by the BCA judges was particularly interesting. They noted that some neutrals lack the appreciation for the "evaluative mediator" role of the neutral. Assuming this is a role the parties want the neutral to fulfill, some neutrals fail to understand the importance of providing each party with an "evaluation" of the strengths and weaknesses of their cases. The neutral's viewpoint on the dispute may help both parties to more objectively view their own position, which may lead to a compromise solution. If the neutral does not provide his opinion and an impasse has occurred, both parties will most likely remain entrenched in their positions and the dispute will not be resolved. The BCA judges may hold this concern because they personally feel more comfortable providing their opinion since they regularly do so when making Board decisions. Private neutrals, who are not regularly asked to render decisions (as BCA judges are), may be more reluctant to provide their opinion on each of the parties' strengths and weaknesses. When asked for such an opinion, they may over emphasize the strengths or the weaknesses of a party, unknowingly provide a biased assessment of a party's position, or may avoid providing an evaluation altogether.

BCA judges noted that the second part to the "evaluative mediator" was the importance of the neutral's role as mediator. A few BCA judges admitted that being a judge does not necessarily make a person a good mediator. Although most judges do

possess strong mediator skills, these unique skills must be learned, not just assumed to be held by virtue of a judge's position.

C. PROBLEMS ENCOUNTERED WITH SENIOR MANAGEMENT PRINCIPALS

1. Survey Results

As discussed in Chapter IV, the role of the principal is to listen to each party's presentation, objectively evaluate the material presented, and conduct negotiations with the opposing party's principal. Most individuals selected as neutrals are well-versed in the facts of the case, competent, objective, and possess sound business judgment. These individuals should also have the authority (up to some dollar amount) to settle the case. The same three groups of Board of Contract Appeals (BCA) judges, Government attorneys, and private attorneys were asked by the researcher what the most common problems encountered with senior management principals were during Mini-Trials. Overall, most of the individuals surveyed noted that they had personally encountered few problems with senior management principals. Although some individuals had not experienced problems with principals, they knew of and shared problems encountered by their contemporaries.

When asked what the most common problems associated with principals were, BCA judges resoundingly agreed that it was the principal's lack of authority to settle the dispute. Without the requisite authority to settle the dispute, any agreement made by the principal would have to be approved by someone senior to him. If the principal has to ask for approval of his decision, his initial agreement is subject to overruling which

undermines the Mini-Trial's (and ADR's) purpose of providing a relatively quick means of resolving a dispute. Judges cited other problems regarding principals as well. The principal was too busy and unwilling to devote the requisite time to resolve the case, was not objective and too emotionally involved in the case, and was not adequately prepared for the trial.

Private attorneys surveyed by the researcher claimed that the principal's reluctance to make a decision is the greatest problem encountered with principals. Several attorneys noted that many principals were concerned that if they made a decision that was perceived as "wrong", it may have a negative impact on their career. The second most frequent problem cited was the principal's lack of authority to settle the dispute. Other problems with principals cited by the attorneys included the principal's lack of time to devote to the dispute, lack of ability to compromise, poor preparation caused by lack of access to the principal, and resentment from lower level personnel for the principal's role in resolving "their" dispute. Senior managers have numerous responsibilities that occupy their time. If the time the principal has to devote to the dispute is very limited, they may not be adequately prepared for the Mini-Trial. It is not surprising the private attorneys mentioned this as a problem since they are often called upon to prepare the principal for the Mini-Trial. If the principal has been too involved in the earlier stages of the dispute, he may be too entrenched in his opinions to compromise with the opposing party. In addition, the principal's may not have a compromising personality. Any time senior management is called upon to resolve a dispute, lower level personnel may resent the principal's participation in a dispute they believe should be handled at their level. Lower

level personnel may believe that the principal does not fully understand the details of the dispute and will compromise on issues that they believe should not be compromised.

Government attorneys provided the greatest number of varying responses when asked what problems were encountered with principals. Over three quarters of the attorneys surveyed cited the principal's lack of time and unwillingness to devote the necessary time as the greatest problems. The attorneys believed that many principals did not consider their role as principal as their primary priority. The second most frequently obtained response was the principal's lack of authority to settle, followed by the lack of available preparation time for the principal. Other problems with principals cited by the attorneys included the principal's unwillingness to keep the presentation team informed, unwillingness to compromise, lack of "feel" for the dispute, lack of acceptance of the principal by the other side, and difficulty in finding an objective, non-emotional principal with negotiation skills. One Government attorney also believed that many "corporate" principals were biased and unable to be objective.

2. Analysis

There is a great deal more consensus on the problems encountered with principals than with the problems with neutrals discussed earlier. All three groups surveyed by the researcher cited the following problems with principals:

a. Often too busy and unwilling to devote adequate time to resolve the dispute.

b. Often lack the necessary authority to settle the dispute.

c. Lack of sufficient preparation time.

It is not surprising to the researcher that all three parties cited the principal's general lack of preparation time and unwillingness to devote the necessary time to resolve the case. Senior managers frequently hold a plethora of responsibilities which demand a great deal of time and energy. Since few (if any) "spare" managers are available to act as Mini-Trial principals, prospective principals are usually performing their normal tasks and responsibilities when called upon to be a principal. Most managers can not afford to "drop everything" to work on the Mini-Trial and usually end up devoting only a small percentage of their time to Mini-Trial preparations. Since both Government and private attorneys are responsible for preparing their respective principal, they are most likely to become frustrated by the lack of available preparation time.

The unwillingness by some principals to devote the necessary time is likely due to the on-going demands of the organization. Unless the organization relieves the principal of all other responsibilities, the manager will have to juggle his normal work schedule and deadlines around trial preparations. When posed with balancing normal job requirements and short-term trial preparations, most managers would allocate most of their time to their primary responsibilities. In addition, a busy manager may not have wanted to be the principal and may resent his new, unexpected assignment. If this were the case, a manager may make a half-hearted effort in preparing for the trial.

For a Mini-Trial to be successful, the principal must have the requisite authority to settle the dispute. As all three groups noted, a principal without authority will have to receive approval from more senior management. The Mini-Trial may be doomed to failure if the principal is unable to receive necessary approval. The other party which bargained in good faith, believing it had an agreement, would believe it had wasted its time and

would most likely pull out of any future negotiations. This would force the dispute to be decided at the Board or in court. To avoid this scenario, most neutrals require each party to certify that they have the needed authority to settle the dispute. One BCA judge commented that he "does not even begin the trial proceedings without ensuring both parties have the proper authority."

Two of the three groups, the BCA judges and Government attorneys, noted that the unwillingness of the principal to compromise was a problem. There are several reasons why a principal may be unwilling to compromise. Some principals are too familiar with their party's position to be objective. Even if the other party's presentation shows some valid points, the principal can not overcome his belief that his side is without fault. Other times, the principal is not able to compromise for fear of being seen by his trial team and by senior management as too cooperative. If the principal gives even an inch, he believes he is perceived as being weak.

Another reason that may explain why Government attorneys believe some principals are unwilling to compromise can be found in the natural rivalry between principals and lawyers. In a Mini-Trial, the attorneys are responsible for the presentation of the material, however, the principal has the ultimate authority to settle the issue. Some attorneys may dislike handing over control of the outcome to the principal. If the attorney is anti-ADR and the Mini-Trial has not been successfully negotiated, the attorney can lay blame for its failure on the principal's unwillingness to compromise.

A fourth reason for not compromising is concern that the ultimate settlement will be viewed by senior management as "selling the farm" – the idea that the principal gave up too much. In this situation, the principal simply does not compromise, thereby avoiding

any potential backlash and second guessing from senior management. This possible reason for unwillingness to compromise ties in well with what the private attorneys said about the principal's reluctance to settle. Concern over possible career ramifications may lead some principals to avoid making a tough decision. When the principal avoids settling the dispute, he ensures that "someone else", probably a BCA or court judge, will decide the issue. The researcher was surprised that the Government attorneys did not mention any reluctance on the part of Government principals to make the tough decisions especially in light of future General Accounting Office (GAO) reviews. This may be due to Government agencies empowering their principals to make the best sound business decision possible.

A few Government attorneys surveyed believed that it is difficult to find a good negotiator to act as a principal in the Government. The researcher finds it hard to believe that there are not many highly qualified negotiators in the Government. It is more likely that what the attorneys are saying is the process the Government uses to select its principals does not produce the optimal principals. Particularly in large disputes, a principal is selected based on his position, seniority, and or rank, not based on his negotiation skills. Just because a potential principal is a member of the Senior Executive Service (SES), a Flag officer, or a technical expert, it does not mean he will be a skilled negotiator. The researcher believes that if the Government puts as much time into selecting its principal as it does in selecting its neutrals, there would be no problem with finding principals with strong negotiation skills.

D. THE UNASSISTED MINI-TRIAL

1. Discussion

While exploring the Navy's use of the Mini-Trial, the researcher came upon an interesting concept known as an unassisted Mini-Trial. Based on conversations with a few Government attorneys, the unassisted Mini-Trial essentially follows the same format as the normal Mini-Trial described in Chapter IV, however no neutral is utilized to assist the parties in reaching a resolution. Although lacking a neutral, the parties in an unassisted Mini-Trial still sign an ADR agreement, exchange position papers, make presentations to a panel made up of party principals, and conduct negotiations following presentations. The Navy has used this technique when a neutral could not be found that was satisfactory to both parties. The researcher surveyed BCA judges, and Government and private attorneys to determine the rationale and utility of the unassisted Mini-Trial. Of those who had heard of this hybrid Mini-Trial, most agreed that the rationale for using it was that both parties were confident that they could reach a resolution without assistance. Furthermore, they believed that the unassisted Mini-Trial might be used when simple factual presentations were enough for parties to determine a quantum.

Every BCA judge surveyed commented that the unassisted Mini-Trial was merely an elaborate unassisted "negotiation" and that this technique had little or no value. Several judges said that the unassisted Mini-Trial had had little success in resolving disputes. One judge's comment sums up most of the BCA judges' opinions; "it does not hurt using a neutral...no Mini-Trial should fail for want of a neutral." The response received from private attorneys was similar to the response received from the judges. Every response was, for the most part, negative towards the use of the unassisted Mini-

Trial. Most of the attorneys commented that a good neutral was vital in order to settle tough cases and two of the attorneys called it a "contradiction in terms". The opinion of one attorney was shared by most of the other attorneys; "In most circumstances, [neutral] assistance is needed unless a presentation of facts in summary format will in itself convince...decision-makers of what is the correct resolution of the dispute."

Government attorneys surveyed were more divided in their responses on the utility of the unassisted Mini-Trial. Two thirds of all Government attorneys surveyed believed the unassisted Mini-Trial was not an effective technique without the assistance of a neutral. However, those who favor the use of the unassisted Mini-Trial said it was a "good negotiation process", assuming parties were willing to negotiate and compromise. When only Navy attorneys were considered, the responses were split, half favoring its use while the other half believing it had no value. An attorney at the Navy Litigation Office explained the reason for the split. He said that the mixed responses were most likely due to their office's recent success in two unassisted Mini-Trial cases.

2. Analysis

Based on analysis of each parties' responses, it is understandable why each party responded the way they did. Because most BCA judges are proponents of ADR and regularly act as third party neutrals in ADR proceedings, they will most likely favor a Mini-Trial proceeding that relies on the skills that a talented neutral can bring to a trial. Furthermore, unless a BCA judge had prior Government or private practice experience with the unassisted Mini-Trial, judges may not be in the best position to objectively

evaluate this technique. Any knowledge of the strengths and weaknesses of such a technique would be based on second-hand information or on their own speculation. If the judges had more exposure to some of the success stories, their responses may have been more favorable towards the unassisted Mini-Trial. Regardless, BCA judges have a great deal of experience with disputes and ADR, so their lack of enthusiasm for the technique may be well founded.

The Government and private attorney responses were generally negative, with the exception of the Navy Litigation Office contingent. Many of the attorneys (both Government and private) had little or no experience with the unassisted Mini-Trial, so it is not surprising to the researcher that they question the technique's utility. Despite the Navy's success with the unassisted Mini-Trial, only half of the Navy attorneys responded favorably towards the unassisted Mini-Trial. More than likely, every attorney in the Navy Litigation Office had recently heard of its use and success, but still some were not convinced of the technique's usefulness. The researcher can only speculate as to why some Navy attorneys still did not favor the technique. The answer could be that these attorneys saw its limited usefulness since the Navy only used the unassisted Mini-Trial when both parties could not agree on a suitable neutral. Another answer maybe that despite its limited success (only a few cases have been successfully resolved), the unassisted Mini-Trial is not established enough to be fully supported by these attorneys. A third answer may be that these attorneys simply prefer having a third party neutral available to assist the parties as needed.

When exploring the unassisted Mini-Trial, no published advantages or disadvantages for this technique were found by the researcher. Exploring these pros and

cons might help explain why the majority of survey respondents did not favor the use of the unassisted Mini-Trial. Based on analysis of the Mini-Trial and the unassisted Mini-Trial, the researcher formulated the following advantages of the unassisted Mini-Trial:

a. Provides a satisfactory option in the event that the parties can not agree on the selection of a neutral.

b. Saves money that would be spent on hiring a private neutral (assumes BCA judges are free).

c. Provides structure to the exchange of information between parties.

d. Allows only the parties to influence the outcome of the dispute since no neutral is present. A neutral's perceived "agenda" will have no impact.

e. Expedites the process, by possibly, eliminating the administrative time required for the parties to find a neutral. This time may be better spent on resolving the dispute.

f. Works well if both parties feel confident that the decision-makers can maintain control of the proceedings and can compromise.

Despite the advantages listed above, the researcher would suggest the following disadvantages of the unassisted Mini-Trial:

a. The burden of breaking deadlocks, maintaining order, formulating innovative and alternative solutions, and keeping the parties focused on the issues will fall squarely on the shoulders of the principals.

b. There will not be an objective third party evaluation of each party's position.

c. Its success is based on the condition that both principals are cooperative and willing to compromise. If the principals are combative or well entrenched in their respective side's position, they may be less than willing to look for "common ground".

d. It may prolong the trial and negotiations since there will be no neutral "driving" the discussions.

After considering its advantages and disadvantages, the unassisted Mini-Trial has some utility. The researcher has determined that the unassisted Mini-Trial is best used in situations where the parties have a strong long-term relationship and are willing to compromise. It can provide a structure to the exchange of information and may expedite settlement if both principals are able to work well together. However, the unassisted Mini-Trial may overly burden the principal with responsibilities normally performed by a neutral. Only the strongest, most capable of principals will be able to handle this burden. In addition, without a neutral, there will be no objective evaluation, which can often inject a sense of realism into a party's positions. When weighing the advantages and disadvantages of the unassisted Mini-Trial, it appears to the researcher that the advantages a neutral brings to the proceeding far outweigh any disadvantages he may present. This weighing of pros and cons may explain the negative feelings many of those surveyed had towards the use of the unassisted Mini-Trial.

E. SUMMARY

This chapter focused on the a number of issues surrounding the Mini-Trial. The researcher explored his perception that the Navy was reluctant to use the Mini-Trial. Problems associated with the participation of principals and neutrals in the Mini-Trial were also analyzed. Finally, the researcher examined the utility of the hybrid Mini-Trial technique known as the unassisted Mini-Trial. Chapter VI will analyze the most effective usage of the Mini-Trial and its measures of success. It will also identify barriers that may make it difficult to convince contractors to participate in the Mini-Trial and how the

Government might overcome these barriers. The chapter will conclude with an examination of the Mini-Trial's future as a form of ADR.

VI. ANALYSIS OF THE MINI-TRIAL

A. INTRODUCTION

In Chapter V, several issues surrounding the use of the Mini-Trial were examined. The researcher explored the perception that the Navy was reluctant to use the technique. After analyzing survey opinions, the researcher found that the Navy had no reluctance to use the Mini-Trial and merely selectively chose when to use the technique. The Chapter also explored problems encountered with third party neutrals and senior management principals during Mini-Trials. After examining the problems with neutrals and principals, the researcher examined the Navy's use of the Unassisted Mini-Trial. Chapter VI will continue to study issues involving the use of the Mini-Trial. The researcher will explore the measures of success for the Mini-Trial, as well as examine how the Navy could most effectively utilize the Mini-Trial. This section will be followed by an examination of the barriers that exist to convince contractors to use the technique. The chapter will conclude with a discussion of the Navy's future use of the Mini-Trial.

B. MEASURES OF SUCCESS OF THE MINI-TRIAL

1. Survey Results

Despite the plethora of material written about the Mini-Trial and ADR, no published material was found by the researcher addressing the measures of success of the Mini-Trial. By simply looking at the advantages of the Mini-Trial discussed earlier in Chapter III, the reader may believe the measures of its success are whether the dispute was resolved, and whether there were savings, in terms of cost and time, over traditional

litigation. As with all ADR techniques, the main goal of the Mini-Trial is to resolve the dispute. Consequently, it makes sense that if the parties settle the dispute, the Mini-Trial can be considered successful. Furthermore, cost and time savings are usually advertised as the biggest advantage of pursuing ADR over litigation. Therefore, if the parties saved time and money, the trial would also be considered a success. Despite these elementary answers, the researcher believes there are several other measures of success for the Mini-Trial.

The researcher's survey asked Board of Contract Appeals (BCA) judges, and Government and private attorneys to provide their opinions regarding the Mini-Trial's measures of success. The BCA judges commented that the best measures of success of the Mini-Trial were the following (in order of importance):

1. Resolves/settles the dispute.
2. Saves the parties money.
3. Narrows the issues in the event that the parties were unable to resolve the dispute.

Four of five judges surveyed agreed that resolving the dispute was the most important measure of success. One judge went so far as to say that from his perspective as a neutral, "the only measure of success [for a Mini-Trial] is settlement". However, he did add that from the parties' perspective, there may be other measures of success. In terms of cost savings, three judges commented that cost savings should be compared to the agency's "cost ceiling" (the amount the agency would have been willing to pay to resolve the dispute). If the dispute is resolved for less than the cost ceiling, the Mini-Trial should be considered successful. If the dispute is resolved for an amount greater than the ceiling, the

Mini-Trial should be viewed as unsuccessful. Other measures of success cited by the judges included time savings (when compared to the time it would take to get a Board or court decision), and partial resolution of the dispute.

Private attorneys surveyed provided the greatest number of different responses to the question on measures of success. They believed the most important measures of success for the Mini-Trial were the following (in order of importance):

1. Resolves/settles the dispute.
2. Saves the parties money.
3. Saves the parties time. (tie)
3. Preserves the parties' long-term relationship. (tie)

As expected by the researcher, all of the attorneys surveyed believed that resolving the dispute was the most important measure of success, followed by savings in time and money. These top three responses are identical to those received from the Government attorneys listed below. Preservation of the parties' long-term relationship also placed high in order of importance. One attorney surveyed said that if the relationship is still good or has gotten better after the trial (regardless of its outcome), the Mini-Trial was a success. Other measures of success cited by the attorneys included the parties' satisfaction that a "reasonable" settlement was achieved, the freeing up of the witnesses' time from months or years of discovery and trial preparation to weeks or months, narrowing of the issues, and giving the parties an opportunity to have their "day in court" (they had their chance to tell their side of the story). In addition, another attorney believed that a Mini-Trial was successful if the rationale for the settlement could be defended. If the decision could be proven as a sound business decision, it must be a successful Mini-trial.

The top three survey responses received from the Government attorneys were similar to those received from the BCA judges and private attorneys. The Government attorneys believed the most important measures of a successful Mini-Trial were the following (in order of importance):

1. Resolves/settles the dispute.
2. Saves the parties time.
3. Saves the parties money. (tie)
3. Narrows the issues if the parties are unable to resolve the dispute. (tie)
3. Both sides were satisfied that a "reasonable' settlement was achieved. (tie)

Nearly every attorney surveyed agreed that resolving the dispute was the best measure of success. They also placed a great deal of emphasis on saving both time and money and narrowing the issues. Other measures of success cited by the Government attorneys included preservation of the parties' long-term relationship, partial resolution of the dispute, and the expediting of the discovery process. In regards to preserving the parties' long-term relationship, two optimistic Government attorneys commented that even if both sides gave the Mini-Trial their "best effort" but failed to reach resolution, the parties might retain or even foster a stronger relationship. They suggested that this stronger relationship may help the parties reach a negotiated settlement even after the Mini-Trial technique has failed.

2. Analysis

All three groups surveyed concur that resolution of the dispute, and time and cost savings are important measures of success. As stated earlier, resolution of the dispute is

the primary goal of those participating in the Mini-Trial. If the parties did not want to resolve the dispute, it is unlikely that they would waste their time and resources preparing for the trial. The cost and time savings responses were predictable since these are the "advertised" advantages of the Mini-Trial and ADR. Many of the individuals surveyed may have actually saved money through their own experience with the Mini-Trial. However, several of the individuals responding to the survey had little personal experience with a "real" Mini-Trial. This leads the researcher to believe many of those citing cost and time savings may have merely "mimicked" the standard advantages of the Mini-Trial as measures of success.

As discussed earlier, preparation for the Mini-Trial consumes a great deal of time and resources, even if discovery and witness preparation is limited. Preparation can last up to several months. Since attorney "time" translates into attorney "fees", legal costs can quickly mount, making the Mini-Trial a very expensive ordeal. The researcher is willing to concede that the Mini-Trial is usually a shorter process than actual litigation, so "ball-park" cost savings can be estimated if the Mini-Trial is successful. However, cost savings can only be "estimated", not accurately determined. These savings also assume the Mini-Trial process successfully resolved the issue. If the Mini-Trial fails, additional preparation costs will be incurred and some duplication of effort may be required. It is also difficult to predict what costs may have been incurred at the Board. During the detailed literature search for this study, the researcher found no Government or private survey or study results showing conclusive evidence of the Mini-Trial's or ADR's cost savings. Regardless of the researcher's concerns over the estimation of cost savings and some

responses possibly mimicking the Mini-Trial's advantages, it appears that these savings do exist and can be roughly calculated if a Mini-Trial successfully resolves the dispute.

Of all of the groups surveyed, the BCA judges were the only group unconcerned about retaining the parties' long-term relationship. When acting as Mini-Trial neutrals, most BCA judges are concerned with filling the role delegated to them and helping the parties reach a successful resolution. Since they are most concerned with resolving the dispute, the parties' long-term relationship may only be an afterthought to the judges. Another reason why the judges may not be concerned with the long-term relationship of the parties is that their involvement with the parties ends with the resolution of the case. After the dispute is settled, it is probable that the parties will have to continue working together to complete the contract or work together on future contracts. This is particularly true in the case of Defense contractors. With the defense industrial base steadily declining in size, Department of Defense agencies and the smaller number of Defense contractors will be working together more in the future. Realizing this, both Government and private attorneys may better understand the importance of maintaining good working relations between the parties. Conversely, damaged working relationships will make future dealings difficult.

Unlike both groups of attorneys, the BCA judges were not concerned with the parties reaching a "satisfactory outcome". This may be because "satisfactory" is a subjective term. A "satisfactory outcome" to one party may not be a satisfactory outcome to another. Another reason may be that, as discussed in the proceeding paragraph, judges do not have to live with the outcome, so whether it is satisfactory or not is not their concern. As one BCA judge commented, "each judge is only concerned with a settlement

that is within a 'zone of reasonableness'....so long as the settlement is within that zone, judges won't say anything". Furthermore, BCA judges might simply believe that if the parties voluntarily agree to settle the dispute, it is assumed the resolution was "satisfactory" to both parties.

After reviewing all of the responses, the researcher observed that one possible measure of success was missing. None of the group surveyed suggested that the parties willingness to use the Mini-Trial again should be used as a measure of success. As discussed earlier, the Mini-Trial is most frequently used in very complex cases that require senior management attention. Since many disputes are not particularly complex and do not necessarily require senior management participation, a party that had previously used the Mini-Trial may not have a second opportunity to use it. Other parties who have successfully used the Mini-Trial may not use it again due to its structure or may choose another less formal method of ADR, such as Mediation or Negotiation. However, if the parties showed a willingness to use the Mini-trial a second time, this willingness may indicate that the parties have faith in the Mini-Trial's ability to help them resolve future disputes. In other words, the parties would not use the Mini-Trial again unless they believed it had been successful. An example may provide further clarification. If the owner of a Honda automobile was willing to purchase another Honda after his old one has worn out, this would most likely indicate that he was pleased with the earlier Honda. The same could be said for the parties involved with the Mini-Trial. If the parties are willing to use the Mini-Trial again, it appears that their previous experience with the technique was successful.

C. MOST EFFECTIVE USAGE OF THE MINI-TRIAL

1. Literature Review

To the best of the researcher's knowledge, there is no previously published study that addressed how the Navy could most effectively use the Mini-Trial or ADR. However, there are a few published articles and documents that describe what other Government agencies have done to maximize their usage of the ADR. For instance, a recent article about ADR recommends that agencies get their contractors to sign a letter of commitment which expressly states that both sides will use "preferred alternatives to litigation."[Ref. 40, pg. 24-25] Another article suggests that a combination of ADR awareness training for Contracting Officers (COs), Government attorneys, and Program Managers (PMs), and publicizing ADR success stories will increase the usage of ADR.[Ref. 15, pg. 54-55] The article's author believes that increased awareness training, particularly for COs and PMs, will increase senior management's support for ADR. A third article also recommends active support from senior management, extensive training for attorneys, and awareness training for COs and PMs.[Ref. 29, pg. 40]

Other documents recommended additional methods for maximizing the usage of ADR. Based on their recent success with a Mini-Trial, the Navy produced a "Lessons Learned" document which stated that it is important to ensure that adequate funds are available "up front" to settle the dispute.[Ref. 35, pg. 4-5] This recommendation was included due to a funding problem encountered once their Mini-Trial was successfully concluded. Another recommendation made in the "Lessons Learned" was to ensure the principal provided "frequent consultation and briefings before a final settlement is reached

to ensure that all parties will support the agreement". The rationale behind this recommendation is by acquiring settlement approval, the principal avoids second-guessing by senior management. An after-action report from the Army Materiel Command suggested that in addition to awareness training for COs and PMs, the parties should incorporate an ADR clause in their contract that "encourages contractors to request the use of ADR."[Ref. 25, pg. 7]

2. Survey Results

Although the literature search provided general recommendations on the use of ADR, only one document actually addressed how the Mini-Trial could most effectively be used. In order to more specifically "hone-in" on the Mini-Trial, the same three groups (BCA judges, and Government and private attorneys) were asked how the Navy could most effectively utilize the Mini-Trial. All three groups surveyed believed that the Navy could most effectively utilize the Mini-Trial by doing the following:

a. Conducting Mini-Trial awareness training for Contracting Officers, Program Managers, and other senior management. Training might cover the Mini-Trial's procedures, its advantages and disadvantages, and in what circumstances it may be most successful.

b. Educating Navy and private attorneys on the use of the Mini-Trial. Training might include discussing the Mini-Trial's structure, drafting of the ADR agreement, convincing the opposition that the Mini-Trial is in their best interest, and presentation techniques for the Mini-Trial.

c. Publicizing the Navy's success with the Mini-Trial.

d. Ensuring senior management is supportive of the Mini-Trial process, to include empowering the principal to make the best business decision and not second-guessing his decision.

Beyond the above four recommendations, there was little consensus among the groups or among individuals within each group. Other recommendations made by individuals included publicizing the Government's policy of using ADR (and the Mini-Trial) to the maximum extent practical, eliminating settlement funding problems (deciding which Government organization will pay for the settlement and what type of funds will be used), studying the U.S. Army Corps of Engineers successes and failures with the Mini-Trial, selectively utilizing the Mini-Trial (realizing the Mini-Trial is not appropriate in all disputes), including an ADR clause that requires the parties to attempt some form of ADR prior to resorting to litigation, and tailoring each Mini-Trial agreement/process to fit the individual dispute (not establishing "model" terms and conditions). One BCA judge also recommended that the parties should incorporate a mechanism in the contract to allow the neutral to unilaterally resolve the dispute if the parties failed to resolve the dispute themselves. His reasoning was that if the contract included this "last-resort-arbitrator-like provision", it might encourage them to try harder to resolve the dispute themselves.

3. Analysis

Despite its recent legislation and publicity, many Program Managers and Contracting Officers are still uncomfortable with using Alternative Dispute Resolution to resolve contract disputes. Without increased awareness of ADR and the Mini-Trial, they will continue to doubt the effectiveness of ADR. In order to acquaint PMs and COs with the advantages of ADR, awareness training is essential. Awareness training should also include other senior management personnel who may be part of the decision-making process. ADR and Mini-Trial training is also important for attorneys. The attorney's role

in the Mini-Trial is primarily to present their party's position. As discussed previously, the skills necessary to make an effective Mini-Trial presentation are different that those used in formal litigation. As one BCA judge surveyed noted, "an effective Mini-Trial presentation is different than a regular trial...it differs in length, detail, and presentation style". The Mini-Trial requires the attorney to make an abbreviated *best points* presentation, using easily understood language, not a lengthy, all-inclusive detailed argument as would be used during litigation. Because the Mini-Trial requires a different set of presentation skills, training is required to ensure that Mini-Trial attorneys have the necessary skills to be effective.

Studying the U.S. Army's Corps of Engineers use of the Mini-Trial may be an excellent source of lessons learned. Based on comments received from both Government and private attorneys, the researcher believes the Corps of Engineers is generally recognized as the leader in the Government use of the Mini-Trial. Due to their extensive use of the Mini-Trial, the Navy could learn a great deal from the Corps' successes and failures with the technique. The Corps has published over a half dozen Mini-Trial case studies that analyze their use of the Mini-Trial. Studying the Corps' successes and failures will help Navy attorneys selectively choose which disputes should be resolved using the Mini-Trial. The Corps' case studies would also provide the Navy with ready-made training tools to indoctrinate new attorneys on the advantages and disadvantages of the Mini-Trial.

The Corps of Engineers does an excellent job of advertising its success with the Mini-Trial. Although the Navy has experienced similar success with the Mini-Trial, little is known about their success. The researcher believes that the Corps' success is due in

part to their aggressive publicizing of their experiences with the Mini-Trial. Contractors involved in disputes with the Corps are likely to enter into a Mini-Trial because they are familiar with its structure, procedures, and ability to successfully resolve disputes. If the Navy were to publicize its successes with the Mini-Trial, contractors may be more willing to resolve their contract disputes with the Navy using the Mini-Trial. Since the Navy's successful track-record with the Mini-Trial is not well known, contractors, as well as Navy attorneys, may look to other forms of ADR to resolve disputes.

The recommendation to build a mechanism into the Mini-Trial agreement to allow the neutral to decide the case if the parties are unable to is controversial. The researcher sees several advantages with this recommendation. The first advantage of the mechanism would be to ensure the dispute was resolved at the end of the negotiation sessions, regardless of whether the principals resolved the dispute themselves. Assuming the neutral's decision was binding, this arbitration-like mechanism would prevent the case from going to court or a Board. By allowing the neutral to resolve the dispute, both parties would save additional money and time that would have been spent if the dispute were to continue. Another advantage may be that if faced with the possibility that the neutral could end up resolving the dispute, the parties may try even harder to resolve the dispute themselves. This scenario might occur if they are unsure how a neutral might rule on the dispute. Allowing the neutral to make the final decision if the parties failed to come to a settlement agreement would not be much different than if the dispute were to be resolved later on by a judge in court or at the Board. Finally, if the mechanism was non-binding, the neutral's decision may provide the "buy-in" necessary for both parties to accept the resolution. However, the mechanism has a few shortcomings. If the neutral is

permitted to decide the case, it may pose a barrier to convincing the parties to enter into the Mini-Trial, especially if the neutral's decision was binding. As discussed in Chapter III, one of the advantages of the Mini-Trial is that it ensures the parties retain control over the outcome. If the neutral is permitted to resolve the dispute, the parties would lose that control. A second problem with this mechanism is that it places the weight of the decision squarely on the shoulders on the neutral if the parties can not resolve the dispute themselves. A BCA judge might not have any problem with this responsibility since he is regularly called upon to make such decisions. However, a private neutral with little decision-making in his background may be uncomfortable with the responsibility.

In regards to the problems associated with settlement funding, if the contractor expects significant delays (three or more months) in receiving its money, the contractor may forego the Mini-Trial (or other ADR techniques) and seek quicker settlement funding through the Board. There are basically two methods of funding settlements within the Navy. The first method is to finance the settlement with the current fiscal year's money from the program's budget. Although this may appear the best way to fund the settlement, it can be problematic since few program budgets have cash reserves available for funding settlements. A quicker, short-term method is to pay for the settlement using the U.S. Department of Justice's Judgment Fund. If the Judgment Fund is used, the settlement is paid by the Judgment Fund which is later reimbursed by the program's budget. This method provides quicker payment and provides the Navy with more time to determine how it will repay the Judgment Fund. If the Navy wants to avoid these funding problems, it needs to know how it will fund the settlement (what organization will pay) and which type of money will be used (current year program money or Judgment Fund).

If the contractor knows there will be no delays in receiving a settlement, it may be more inclined to enter into a Mini-Trial.

A "Lessons Learned" document from the Navy's participation in a recent Mini-Trial suggested that the principal conducts frequent consultations with all parties prior to settlement in order to ensure that senior management "buys-in" to the settlement agreement. This recommendation was made to prevent "second-guessing" of the principal's decision by senior management. Although second-guessing can be a problem, the researcher believes that this upward briefing of the chain of command may undercut the authority of the principal. Assuming the principal had the requisite authority and funding limitations, the principal should be given the chance to decide what is in the Navy's best interest based on the presentations and negotiations. By requiring the principal to get "de facto" pre-approval of his decision, he is merely the mouth-piece for senior management and is not a true decision-making principal. By not participating in the presentations and follow-on negotiations, senior management has not gained the insight into *both* parties' positions and is not in the best position to make the decision. Furthermore, if the contractor realizes that any settlement made by the Navy's principal is only tentative, requiring higher approval, the contractor may back out of negotiations since they are not dealing with a principal who has the authority to settle the dispute.

Missing from both the literature and the survey responses is the need to carefully choose the principal. As discussed in Chapter V, just because a potential principal is a military flag officer or a member of the Senior Executive Service, it does not guarantee the candidate will be an effective principal. In addition to having the requisite authority and sound business judgment, a principal must have strong negotiation skills, be willing to

compromise, be willing to devote the time to resolve the dispute, and be open to alternative resolutions.

D. BARRIERS TO CONVINCING CONTRACTORS TO PARTICIPATE IN THE MINI-TRIAL

1. Literature Review

Most Government documents and published magazine articles on ADR discuss different ADR techniques, factors for using those techniques, and the steps various Government agencies are taking to maximize the use of ADR. After reviewing numerous ADR articles and documents, the researcher was able to find only one article that addressed barriers to the use of ADR and none that specifically addressed barriers to the use of the Mini-Trial. The article cited a recent Deloitte & Touche survey which concluded that the greatest obstacle to ADR usage was the general lack of familiarity with ADR techniques and their procedures among Government contracting professionals.[Ref. 6, pg. 8] It recommended ADR awareness training to overcome the lack of ADR knowledge. Unfortunately, the article did not address which Government officials (Program Managers, Contracting Officers, or attorneys) needed the awareness training. Furthermore, the article did not discuss any barriers to convincing contractors to participate in ADR.

2. Survey Results

Since no published information was found, the researcher asked the three groups to cite what, if any, barriers existed to convince contractors to participate in Mini-Trials.

Not surprisingly, all three groups had strong opinions on what barriers existed. However several individuals, including over half the BCA judges and most of the private attorneys, believed that it was harder to convince the Government to participate in the Mini-Trial than it was to convince the contractor. The BCA judges surveyed believed that the greatest barriers to convincing the contractor to participate in the Mini-Trial were the following:

1. Government and contractors have the misperception that "everything" must be litigated.
2. Government and private attorneys are trained to litigate, not to use ADR to resolve contract disputes.
3. Contractor's attorneys lacked a detailed understanding of the Mini-Trial.

Over two thirds of BCA judges surveyed commented that some contractors (and many Government contracting professionals) had the attitude that they must go to court or the Board for resolution. One judge believed this to be the case based on the way people have been educated through television and the movies to believe that litigation "works". The judge commented further that people "are convinced that they will prevail in litigation...they want someone with authority to tell them that they are right and the other party is wrong". A second judge stated that this attitude was caused by private attorneys "hyping up" their clients on the probability of success in their case. By being too confident in their future success, the client "can not believe they could possibly lose the dispute". The judge's comments regarding attorney's lack of ADR training is a common theme discussed earlier in this chapter. Attorneys know how to litigate but are less familiar with abbreviated *best points* style of presentation required in the Mini-Trial. Since the attorneys feel more comfortable with litigation, they may be steering their clients away

from ADR towards litigation. Another barrier mentioned was the contractor's attitude that "too much effort" has already been expended, so they (the contractor) might as well go to court.

Several BCA judges pointed out that they believed contractors were more than familiar with ADR and were more than willing to use the Mini-Trial and other ADR techniques to resolve disputes. A few judges stated that the Government did not show a strong enough willingness to use ADR and honor its settlement agreements. Others stated that the Government had not thoroughly advertised its willingness to participate and its success with the Mini-Trial. One judge noted that the "Government folks needed to be convinced...the contractors, more often than not, make the request for ADR". Based on their survey responses, it appears the BCA judges (as a group) are not convinced that the barriers that exist to use the Mini-Trial are solely the responsibility of the contractors and their attorneys.

When asked what barriers exist to convince contractors to participate in a Mini-Trial, most private attorneys commented that the greatest barrier to contractor participation was the Government's unwillingness to commit to the process. Several attorneys added that some contractors believed that the Mini-Trial (and ADR) was a waste of time since they were unconvinced about the sincerity of the Government's commitment. This attitude about the Government's lack of commitment was also found among some BCA judges surveyed. In addition, many attorneys cited lengthy delays in receiving settlement funding, as well as the Government's lack of publicizing its success with the Mini-Trial as potential barriers to contractor participation. As far as barriers that

were not considered the Government's "fault", the private attorneys mentioned the following:

1. When the contractor believes it has an "open and shut" case against the Government, the contractor is unwilling to participate in the Mini-Trial or other ADR techniques.

2. The contractor's party and attorneys believe the Mini-Trial is too structured and expensive.

3. The contractors wanted to set a legal precedence and explore complex legal issues.

The contractor's belief that it has an "open and shut" case against the Government is a familiar theme echoed by the BCA judges. It appears that some contractors are so convinced in their future success that they will forego ADR in anticipation of fairing better at the Board or in court. As far as a contractor wanting to use a dispute to set precedence or explore complex legal issues, neither the Mini-Trial nor other ADR techniques should be used. As discussed in Chapter III, the Mini-Trial cannot be used to establish legal precedence. Only a Board or court can establish precedence. Furthermore, despite the Mini-Trial's ability to sift through complex factual issues, discussions concerning complex legal issues should occur before a Board or court judge. Unless the neutral is a BCA judge, a neutral may not have enough knowledgeable to discuss complex legal issues.

Not surprisingly, most Government attorneys placed the blame for the barriers that exist on the contractor themselves. The Government attorneys believed the greatest barriers to convincing the contractor to participate in the Mini-Trial were the following:

1. Contractors and their attorneys do not have a good understanding of the Mini-Trial.

2. Due to their lack of Mini-Trial (and ADR) knowledge, private attorneys guide their clients away from ADR and towards litigation.

3. Contractors will only use the Mini-Trial and ADR only when they believe it is in their "best interest".

Many of the Government attorneys surveyed by the researcher pointed out that their private attorney counterparts were neither familiar nor comfortable with the Mini-Trial. Like their private attorney counterparts, the Government attorneys commented that the contractor was unwilling to commit to the process and had a preference for litigation. The third barrier above indicates that some Government attorneys have a very cynical outlook towards private attorneys representing contractors. One Government attorney commented that "there are inherent barriers preventing us [Government attorneys] from convincing them [private attorneys] to use any type of ADR...." The attorney further explained that if the Government suggests the use of ADR, the contractor automatically believes ADR must not be in its "best interest". The harder the Government tries to convince the contractor to use ADR, the more suspect the contractor will become of the suggestion. Another attorney added that many contractors will participate in ADR only if they believe they (the contractor) will fair better financially than going to court. This comment may imply that the contractor is trying to obtain some financial gain to which it is not entitled.

Despite the cynical outlook described above, a few Government attorneys surveyed pointed out that the Government was responsible for some of the barriers. From their experience, they believed that the contractors may be more willing to participate in

ADR (and the Mini-Trial) than the Government. The attorneys explained that ADR was cheaper and held the prospect for a quicker resolution of the dispute for the contractor than formal litigation. Like their private attorney counterparts, a few attorneys agreed that the lack of Mini-Trial success publicity by the Government, as well as problems with settlement funding, were barriers to contractor participation.

3. Analysis

From the comments received by the Government and private attorneys, it appears that both groups may be pointing fingers at the other for the barriers that keep contractors from participating in the Mini-Trial. Private attorneys blame the Government for its unwillingness to commit to the process, its poor publicity campaign of Mini-Trial successes, and problems with timely settlement funding. On the other hand, Government attorneys point out that the barriers are primarily caused by the contractor's lack of understanding and their attorney's lack of training regarding the Mini-Trial. They further added that some contractors participate in the Mini-Trial (and ADR in general) only when they hope to obtain some financial gain to which they are not truly entitled. The researcher believes this mutual finger pointing may be due to the natural bias each side has towards the other. Neither side wants to lay blame solely on themselves for the barriers to the contractor's participation in the Mini-Trial. Unlike both sets of attorneys, the BCA judges struck a neutral position by blaming both sides for their lack of ADR training and their leaning towards litigating "everything."

Even if the anti-Government comments of private attorneys are not considered, there appears to be a common belief among many of the BCA judges and some

Government attorneys that the Government has created many of the barriers and is more hesitant to enter into the Mini-Trial and ADR than contractors. A few of the Government attorneys who thought the contractors were more willing to participate suggested that many contractors realize the value of using the Mini-Trial (and ADR). Both groups of attorneys agreed that there were problems involving settlement funding, and the amount of publicity the Government had given to its successful use of the Mini-Trial. This is not to say that the Government is unwilling to participate in the Mini-Trial; merely that the Government may play a large role in erecting barriers that dissuade contractors from participating in Mini-Trials.

If there is indeed some amount of hesitation on the part of the Government, it may be caused by the Government's belief that, in some disputes, the contractor is not entitled to anything. As discussed early in Chapter III, for parties to compromise in a Mini-Trial, both sides must acknowledge some amount of blame. In disputes where the Government believes it is completely blameless, it makes sense that they are not going to compromise where they believe no compromise is warranted. This line of thought might also explain why one Government attorney mentioned that he believed many contractors participated in ADR only because they (the contractors) will fair better financially with ADR than if the dispute were to go to the Board or court. Government attorneys may also be hyping up their clients into believing they have an "open and shut" case against the contractor when in fact they do not. This may lead Government contracting officials to decide that ADR is unnecessary since they will "undoubtedly" win at the Board or in court.

When researching the barriers that exist to convince contractors to participate in Mini-Trials, few solutions were found. Without casting judgment for the cause of these

barriers on either the Government or the contractor, the researcher believes that Government action may help to limit the impact of these barriers. In order to overcome these barriers, the researcher suggests the following solutions:

a. Conduct ADR awareness training for both Government contracting professionals and contractors. The better both groups understand ADR and the Mini-Trial, the more likely they will make informed decisions regarding its use.

b. Conduct in-depth Mini-Trial training for Government attorneys. This training may help attorneys better represent their clients and prepare stronger presentations. If sufficient resources are available, the Government may also consider providing this training to private attorneys on an "as available" basis.

c. Publicize the Government's success with the Mini-Trial as much as possible. Greater publicity will help convince contractors and their attorneys that the Government is willing and committed to the use of the Mini-Trial. Publicity can come in the form of magazine articles, and lectures to civilian contracting, law, and professional organizations.

d. Establish a policy to ensure settlement funds are paid promptly. If the contractor knows settlement funding will be paid quickly, it will be less inclined to opt for a Board or court decision.

e. Establish a central point of contact or ombudsman within each agency to answer contractors' questions regarding the Mini-Trial and ADR. If tensions were high in a dispute, this would provide the contractor the opportunity to ask Mini-Trial or ADR questions without having talk directly to the Contracting Officer or the field activity's attorneys.

f. Conduct face-to-face meetings between Government and contractor senior management without the presence of either side's attorneys. An informal meeting may give the Government the opportunity to convince its contractor counterparts that the Mini-Trial (or other ADR technique) is in both parties' "best interest."

If the survey responses of the Government and private attorneys are true indicators of how the parties feel towards one another, no combination of solutions will remove the barriers of suspicion and distrust that exists between parties. However, the solutions

recommended by the researcher may convince more contractors to participate in the Mini-Trial.

E. FUTURE USE OF THE MINI-TRIAL

1. Survey Results

A 1995 survey conducted by Deloitte and Touche found that 83 percent of Government contracting professionals and 75 percent of private attorneys believe ADR usage will increase in the coming years.[Ref. 27, pg. 2] Despite these promising results for ADR's future, these findings do not necessarily mean that the Mini-Trial's use will also increase in the future. A recent article about the Corps of Engineers Board of Contract Appeals suggests that although there is a growing trend in the use of ADR to handle disputes, there is also "a gradual progression from almost exclusive use of the Mini-Trial to less structured facilitation and mediation."[Ref. 36, pg. 467] In order to further explore the Mini-Trial's future, the researcher asked the same three groups to predict the future use of the Mini-Trial and to explain their reasoning.

When all of the groups' survey responses are combined, 52 percent believe the use of the Mini-Trial will increase, 26 percent believe it will decrease, and the remaining 22 percent believe its use will remain stable. These preliminary figures suggest that the Mini-Trial's use will increase in the future. However, when the combined group is broken down further, the results are less conclusive. There was no consensus among either the BCA judges or the private attorneys. Each group was split approximately 50-50, with half of each group believing its use will increase, while the other half believing its use will decrease. Each group also had a small handful of those who believe its use would remain

stable. Only the Government attorneys surveyed believed that the Mini-Trial's use would increase. Of those Government attorneys surveyed, 57 percent believe its use would increase, 14 percent believe it will decrease, and 28 percent believe its use will remain the same.

Many of the Government attorneys who believe the Mini-Trial will be used more often in the future cited the Mini-Trial's benefits as the primary reason for their belief. They suggested that the Mini-Trial's ability to save the parties time, money, and resources will convince parties in the future to use the Mini-Trial. The attorneys also stated that the Mini-Trial enables the parties to work through conflict while preserving their working relationship. A few attorneys suggested that BCA judges were recommending the Mini-Trial more often during their pre-conference hearing as an alternative to a Board hearing. One Government attorney suggested that the Mini-Trial will be used more often due to the dollar size of the cases. He explained that although procurement funds and the number of claims filed are shrinking, the dollar size of the claims were increasing dramatically. The attorney cited the Navy's A-12 aircraft dispute as an example of a recent "large dollar" claim against the Government. With greater and greater amounts of money involved, the attorney believes that senior management will be more willing to get involved in the dispute. Since the Mini-Trial maximizes the use of the senior management participation, he believes senior managers will want to use the Mini-Trial more often in the future.

In addition to those reasons cited by the Government attorneys, two other reasons were cited by BCA judges and private attorneys for the Mini-Trial's increased use in the future. The first reason was that as Mini-Trial success stories receive greater attention and publicity, the Mini-Trial's increased popularity will foster increased usage. The

second reason was that the Mini-Trial (as well as other ADR techniques) is similar to procedures originally envisioned for the Boards of Contract Appeals – a fair, inexpensive, and expeditious method of resolving disputes. One private attorney noted that "the Boards have adopted cumbersome, formal procedures that characterize litigation." He further stated that the Mini-Trial , "when done right, can give both parties the feeling that they have had their 'day in court'."

A number of reasons were cited by individuals from all three groups who believed that the Mini-Trial will be used less frequently in the future. The most commonly cited reasons were that the Mini-Trial was too complicated, too formal, and too expensive when compared with other techniques such as mediation and negotiations. These responses were similar to responses received to the question regarding barriers to convincing contractors to participate in the Mini-Trial. Others suggested that as members of the contracting community become more familiar and comfortable with ADR, they will custom-design and tailor the ADR process to fit each dispute. Another individual suggested that the Mini-Trial was an early "version" of ADR who's use will decrease as other new techniques are developed. Finally, a few private attorneys believed that in an era of downsizing, senior management did not have time to get involved with disputes. This view is contrary to a Government attorney's comment which stated that senior management could not afford not to be involved in large dollar claims.

2. Analysis

Due to the lack of consensus among BCA judges and private attorneys, the researcher questioned why so many of the Government attorneys believe the Mini-Trial

would be used more often in the future. The first explanation may have something to do with the recent "push" by Government agencies to resolve disputes using ADR. Influenced by recent legislation such as the Administrative Disputes Resolution Acts of 1990 and 1996, most Government agencies have established ADR advocate positions as well as written policies in order to promote the use of ADR. Due to these policy statements, Government attorneys may feel pressured to maximize their use of ADR. This explanation might explain a comment made by a Government attorney who said that he felt pressured by senior management to use ADR. Another explanation might have something to do with the group of Government attorneys surveyed. The group consisted primarily of Navy and Army Corps of Engineers attorneys. These groups have successfully used the Mini-Trial on numerous occasions. Because they are comfortable and familiar with the Mini-Trial, they are more likely to use the technique than other Government agencies less well represented in the survey. Several of the Navy and Corps of Engineers attorneys surveyed have substantial personal experience with the Mini-Trial and are also the ADR advocates for their respective organizations. The researcher is not suggesting that their opinions do not count, but merely that they may have a bias towards the Mini-Trial that other private attorneys and BCA judges do not have. A third explanation may be that since the Navy and the Corps of Engineers attorneys have so much experience with the Mini-Trial, they may be overly comfortable with the technique and less willing to try more innovative ADR advancements. Using the automobile example again, an owner who has good success with Honda automobiles will probably buy another Honda in the future, even if another brand of automobile was just as good or even better. The same might be said about the Navy and Corps of Engineers. Both have had

so much success with the Mini-Trial, they may just want to stay with the ADR technique that they are comfortable using. Private attorneys may have been split in their responses for the exact opposite reason suggested above for the Navy and the Corps of Engineers. Of the private attorneys surveyed, about half of them had some first-hand experience with the Mini-Trial while the others had none. Since they are not as comfortable and familiar with the Mini-Trial as the Navy and Corps of Engineers are, they may be more willing to try new innovative ADR techniques in the future.

The question remains as to the Mini-Trial's future use. Both philosophical camps have logical arguments for why they believe the Mini-Trial's use will increase or decrease. Those who believe the Mini-Trial's use will increase cite the Mini-Trial's benefits of time and cost savings, as well as its ability to preserve the working relationships of parties involved in the dispute. They also believe that future publicity and the increased need for senior management involvement will increase its popularity and use. On the other side, those who believe the Mini-Trial will be used less frequently state that it is too formal, too structured, and too expensive when compared to other ADR techniques such as Mediation or Negotiation. They also argue that in an era of downsizing, senior management does not have the time to participate in a Mini-Trial and that new innovative ADR methods may make the Mini-Trial a "thing of the past."

Although the researcher can see both viewpoints, the arguments presented by those who believe Mini-Trial will be used less frequently appear to be somewhat lacking. They state that the Mini-Trial is too formal and too structured and for some disputes, this may be true. As discussed in Chapter III, not all disputes should be resolved using the Mini-Trial. In those cases where a Mini-Trial is not necessary, other less formal, less

structured ADR techniques can and are utilized. However, a Mini-Trial can be most advantageous in those disputes involving complex factual issues and where a third party neutral can help facilitate discussion and evaluate positions. As far as being too expensive, the Mini-Trial is regarded as one of the more costly ADR techniques due to the amount of discovery and preparation that is conducted, as well as the expense related to the use of a third party neutral. Nonetheless, the Mini-Trial is frequently used as a "last resort" to litigation and its discovery and preparation expenses would be incurred anyway if the dispute were to go to a Board or court. As far as the cost of a third party neutral is concerned, the parties usually split the neutral's fee in half. Even if the neutral's services cost $ 10,000.00, each party would only pay $ 5,000.00 each, an amount that is easily dwarfed by the dollar size of many claims against the Government. Furthermore, if the size of claims against the Government are increasing dramatically, it appears to the researcher that senior management would want to be more involved in resolving the dispute, instead of allowing attorneys to control their organization's destiny. Finally, although the Mini-Trial is an "ancient" technique when compared with other more recent ADR advances, organizations are still looking towards it to successfully resolve their most complex disputes. If these other newer, more innovative techniques are so much more effective than the Mini-Trial, the Government would have surely utilized them in place of the Mini-Trial.

F. SUMMARY

This chapter analyzed the most effective usage and measures of success for the Mini-Trial. It also provided discussion and analysis of the barriers that exist to convince

contractors to participate in the Mini-Trial. Based on the survey responses received, the researcher recommended actions the Government might take to lessen the impact of those barriers. The chapter concluded with an exploration and analysis of the Mini-Trial's future use in Government contracting. Chapter VII will summarize the more important conclusions reached in this thesis as well as answer the primary and secondary thesis questions. The chapter will also make recommendations for the Government's future use of the Mini-Trial and suggest other areas for further research.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. SUMMARY

When used in the right scenario, the Mini-Trial works. It can provide both parties with a fair and reasonable settlement without the risk of going before a Board or court. The Mini-Trial allows parties the opportunity to work out their differences while maintaining their working relationship. It can also save both parties a great deal of time and money. Furthermore, the Mini-Trial allows the parties to retain the decision making authority. The parties also receive the benefit of assistance from a third party neutral who can fulfill any role desired by the parties. The neutral's role may include facilitating discussion, evaluating positions, conducting *ex parte* discussions, and breaking impasses during negotiations. Due to the flexibility of the Mini-Trial, the parties may mutually agree to change the role of the neutral at anytime during the trial if it will help facilitate a settlement.

Even though the Mini-Trial has been used successfully by numerous Government agencies, it should not be considered a panacea for all contract disputes. Although it can resolve large, complex, factual disputes, the Mini-Trial should not be used when either party wants to establish a precedence, explore a difficult legal or policy issue, or use it as a stalling tactic prior to litigation. Nor should it be used when unassisted negotiations could more quickly resolve the dispute. However, once a Mini-Trial has been decided upon, both parties must give their principals sufficient authority to settle the dispute. Without authority, the principals' decisions will be subject to second guessing which may place the negotiated settlement in jeopardy.

The Mini-Trial is not a simple technique and should not be entered into lightly. Both parties must agree on the trial's format as well as the choice and role of the neutral. They must also prepare concise arguments and make *best points* presentations in language that business decision-makers can understand. For attorneys preparing and presenting their party's position, this is no simple task. The Mini-Trial also calls upon senior management principals to devote significant amounts of time preparing for and participating in the trial. For the negotiation phase of the trial to be successful, the principals must objectively evaluate both parties' positions, show a willingness to compromise, and negotiate in good faith. Despite its challenges, the Mini-Trial is an effective and efficient method of resolving contract disputes. As the author of a recent article noted, "With the creative and flexible use of ADR [and the Mini-Trial], contracting professionals can achieve the goal of making procurement work better and cost less, as well as making contracting more profitable." [Ref. 6, pg. 13]

B. CONCLUSIONS

Conclusion # 1: <u>There are four primary measures of success for the Mini-Trial: resolution of the dispute, cost and time savings, preservation of the parties' on-going relationship, and willingness to use the Mini-Trial a second time.</u>

Based on survey results received, the researcher concluded that there are four primary measures of success for the Mini-Trial. The first measure of success is resolution of the dispute. Resolution of the dispute is the primary reason the parties have attempted to use the Mini-Trial and is the most obvious measure of success. Another measure is the cost and time savings achieved by using the Mini-Trial. Even though the Mini-Trial

requires a great deal of preparation when compared with other ADR techniques, it requires far less time than if the dispute were pursued using formal litigation. Since the time spent on a dispute translates into attorney's fees and the costs of other associated personnel, the Mini-Trial's time savings translate into cost savings. Although there is little hard data supporting the Mini-Trial's and ADR's actual cost savings, it is generally agreed upon by ADR practitioners that ADR techniques save the parties money. A third measure is whether the parties were able to preserve their on-going working relationship. If the parties can still work together once the Mini-Trial has resolved the dispute, it must be viewed as having been successful. The final measure of success for the Mini-Trial is whether the parties would be willing to use the technique again to resolve a future contract dispute. If the parties are not willing to use the technique again, the Mini-Trial must not have been that much of a success.

Conclusion # 2: The conditions for the use of the Mini-Trial are the following: the dispute is primarily factual, parties want to maintain control of the outcome, both parties recognize some liability, a clear entitlement exists, the dollar amount of the dispute is sufficiently large, the parties want to preserve their on-going working relationship, and senior management is willing to devote sufficient time to the dispute.

As discussed in Chapter III, several factors or conditions favor the use of the Mini-Trial. Since ADR and the Mini-Trial can not be used to establish precedence and should not be used when important legal issues are at stake, parties should choose the Mini-Trial when factual, not legal, issues are in contention. The Mini-Trial format also allows senior management principals to control the outcome by retaining decision-making

authority. Unlike Boards or courts where a third party judge resolves the dispute, senior management principals representing both parties decide the outcome of the dispute. Another condition for the use of the Mini-Trial is that both parties recognize some amount of liability in the dispute. If one party was completely at fault for the dispute, it is unlikely that the other party would choose to resolve the dispute using alternative dispute resolution. By jointly acknowledging some amount of liability, the parties will be more willing to compromise in order to resolve the dispute. A clear entitlement should also exist. This condition is closely tied to the condition that both parties must recognize some amount of liability. Since both parties recognize some amount of fault in the dispute, they must also agree that one or both of the parties is entitled to compensation. The dollar amount of the dispute must be sufficiently large to warrant the use of the Mini-Trial. Although the researcher did not establish a "Go-No Go" amount for entering into a dispute, it makes sense that if the amount of the dispute is relatively small, other less expensive forms of ADR should be considered. The Mini-Trial is considered to be one of the more complex and expensive ADR techniques. A further condition for the use of the Mini-Trial is the parties' desire to maintain their on-going working relationship. If the parties are forced to work together after the dispute is resolved, they may look to the Mini-Trial to help them maintain the relationship. The Mini-Trial allows the parties to work together to resolve the dispute. If the parties can resolve the dispute on their own, their working relationship will remain amicable. The final condition for the use of the Mini-Trial is that senior management supports the use of the Mini-Trial. With senior management support, the party will be more likely to provide a strong principal to

represent their side and will be less inclined to second-guess the settlement agreement of the principal.

Conclusion # 3: Barriers exist when attempting to convince contractors to participate in the Mini-Trial.

Based on the survey responses received, the researcher concludes that the greatest barrier to convincing contractors to participate in the Mini-Trial is attorneys' lack of knowledge or familiarity with the Mini-Trial's format and procedures. Since many Government and contractor attorneys are more familiar with formal litigation, they tend to direct their clients towards litigation, rather than the Mini-Trial or other ADR techniques. The next largest barrier is the misperception that all disputes must be litigated. This misperception is fostered by television shows and movies which glamorize litigation as though it were the "best" way to resolve disputes. Closely tied to this barrier is the problem of attorneys "hyping" up their clients as to the chances of success in court. If the client is led to believe they are "right" and the other side is "wrong", they will be less willing to participate in an ADR technique that will require them to compromise. Another barrier that exists is the training received by attorneys. Few attorneys are trained to participate in Mini-Trial or ADR proceedings. As discussed in Chapter VI, the skills necessary to be an effective presenter in a Mini-Trial are not necessarily the same required to be an effective litigator. If attorneys do no have the necessary skills to participate in a Mini-Trial, they may be more inclined to direct their clients towards formal litigation. Another barrier is that many attorneys believe the Mini-Trial is too structured and expensive to be effective. Although it is not a panacea for all contract disputes, it is still

much cheaper and faster than pursuing the dispute through formal litigation. Several contractors and their attorneys question the Government's willingness to participate in the Mini-Trial and ADR. Many believe that the Government "talks a good game" (in regards to the ADR), but does not always follow through on their talk. The final barrier that exists is the contractor's concern that settlement funds will not be paid in a timely manner once the dispute has been resolved. If contractors knew settlement funding would be forthcoming, they would be more inclined to participate in the Mini-Trial and ADR than pursue resolution of the dispute at the Board or in court.

Conclusion # 4: The U.S. Navy has not been reluctant to utilize the Mini-Trial to resolve contract disputes.

The Navy was one of the first Government departments or agencies to utilize the Mini-Trial to resolve contract disputes. Despite a few recent problems encountered with neutrals during Mini-Trials, the Navy's recent decision to resolve a large, complex dispute using the Mini-Trial exhibits its current willingness to use the Mini-Trial. Although the Navy does not utilize the Mini-Trial as much as the Army's Corps of Engineers, it does selectively use the Mini-Trial when it believes the technique's advantages can best be exploited. The Mini-Trial was one of the first ADR techniques to gain wide acceptance, however, the researcher believes that the Navy has "graduated" to other less formal and less complex dispute resolution methods such as Mediation and Negotiation. Survey responses received from BCA judges and private attorneys confirm the Navy's willingness to use the Mini-Trial, as well as its transition towards less formal ADR methods.

Conclusion # 5: Selection of the "right" principal is key to the success of the Mini-Trial.

To be an effective Mini-Trial principal, the principal should have strong negotiation skills, be able to objectively evaluate *both* parties' presentations, and have the necessary authority to settle the dispute. The principal must also be able to devote the necessary time to prepare for and participate in the trial. Furthermore, the principal should possess certain personality traits that can help the two sides overcome difficulties and impasses during the trial. These traits include showing a willingness to compromise, being receptive to innovative solutions, being able to develop mutual respect, and having a good sense of humor. On the Government's side, choosing a principal from the Senior Executive Service or flag ranks does not guarantee the principal will have the requisite tools to be an effective principal.

Conclusion # 6: Despite the Navy's limited success with the "unassisted" Mini-Trial, this hybrid technique will not gain wide spread acceptance among ADR practitioners.

For the unassisted Mini-Trial to be successful, the parties must already have a strong long-term relationship and both must be willing to compromise. Since contract disputes challenge even the best of working relationships, many parties need the assistance of a third party neutral to work through their differences. The neutral can facilitate discussion, provide objective evaluation of the strengths and weaknesses of each party's position, help break negotiation impasses, and conduct *ex parte* discussions which may

help the party's "buy-in" to a suggested resolution. In an unassisted Mini-Trial, there is no third party neutral. The responsibilities normally performed by a neutral will have to be performed by the principals. Only the strongest, most capable of principals can handle these additional responsibilities. Although some principals might be up to the task, the researcher believes that no Mini-Trial should fail for want of neutral assistance.

Conclusion # 7: Although the third party neutral can fill any role assigned by the parties, there are two primary roles commonly performed by a neutral to help resolve the dispute: facilitation of discussions, and evaluation of parties' positions.

The first role commonly filled by the neutral is to facilitate discussion between the parties. By facilitating discussion, the neutral keeps communications open and the parties focused on the dispute which prevents the parties from becoming "stuck" on a particular issue. By focusing the parties on the issues, the neutral can help the parties realize the common ground that exists between them. The neutral may also conduct *ex parte* discussions with the parties which allows the parties to use the neutral as a sounding board for possible solutions to the dispute. The second role that is often performed by the neutral is to evaluate the strengths and weaknesses of each party's position. A neutral evaluation of both parties' positions can inject a dose of realism into the dispute, permitting the parties to see their position in a different light. Neutral evaluation can also give each party an idea of how their position may be viewed by a Board or court judge. This is particularly true if the neutral has significant Board or court experience and is often called upon to render judicial decisions.

Conclusion # 8: Board of Contract Appeals judges are the best choice for neutrals in a Mini-Trial.

Board of Contract Appeals (BCA) judges acting as Mini-Trial neutrals have a great many advantages over other neutrals. BCA judges have a wealth of experience in dealing with contract disputes, are intimately familiar with contract law, and possess unquestionable credentials. If a party is concerned about possible bias, the judge's public record of rulings is easily accessible for examination. Unlike their private counterparts who often charge hundreds of dollars per day, BCA judges are inexpensive, if not free. Due to their position as a judge, they are regularly called upon to render judicial decisions. This is particularly helpful if the judge is asked by the parties to predict the outcome of the dispute if it is not resolved during the Mini-Trial. A BCA judge's stature also carries a great deal of weight with parties. Recommendations for possible solutions coming from the judge may facilitate "buy-in" by the parties.

Conclusion # 9: Despite its limitations, the Navy will increase its use of the Mini-Trial in the future.

As more publicity is given to the Government's successful use of the Mini-Trial, more contractors and Government agencies will want to use the Mini-Trial. As the phrase goes, "success breeds popularity". The Mini-Trial saves the parties money and resources while reducing the time needed to resolve the dispute. It also allows the parties to work through their dispute while retaining their working relationship. The Mini-Trial's format forces the parties to condense their arguments into concise *best points* presentations which

allows the party's principals to evaluate and resolve the dispute themselves. Unlike traditional litigation where the judge and attorneys control the outcome, the parties' principals retain control of the proceedings and decision-making authority. Furthermore, as the monetary size of claims grows, senior management principals will find it even more important to participate in disputes. The main thrust of the Mini-Trial is to allow business decision-makers to make sound *business* decisions.

C. RECOMMENDATIONS

The following are recommendations dealing with the Government's use of the Mini-Trial:

Recommendation # 1: Continue to use the Mini-Trial and alternative dispute resolution whenever feasible to resolve contract disputes.

As discussed in Chapters II and III, ADR and the Mini-Trial present many advantages over traditional litigation including expediting resolution, saving scarce financial resources, preserving the on-going working relationships, and maintaining control over the outcome. In order to streamline the dispute process, the Department of Defense, and the Navy in particular, should continue to maximize the use of these techniques in order to save time and money.

Recommendation # 2: Conduct ADR awareness training for both Government contracting professionals and contractors.

The better both groups understand ADR and the Mini-Trial, the more likely they will be to make informed decisions regarding its use. Awareness training will hopefully convince both groups that ADR is in *both* parties' best interests.

Recommendation # 3: Conduct in-depth Mini-Trial training for Government attorneys.

As discussed in Chapters V and VI, the skills necessary to make an effective Mini-Trial presentation can be very different from the skills needed for traditional litigation. This training may help attorneys better represent their clients and prepare stronger presentations. If sufficient resources are available, the Government may also consider providing this training to private attorneys on an "as available" basis.

Recommendation # 4: Publicize the Government's success with the Mini-Trial as much as possible.

Greater publicity will help convince contractors and their attorneys that the Government is willing and committed to the use of the Mini-Trial. If contractors know the Navy has successfully used the Mini-Trial, they may be more inclined to use the Mini-Trial in a future dispute. Publicity can come in the form of magazine articles, agency circulars, and lectures to civilian contracting, law, and professional organizations.

Recommendation # 5: Establish a policy to ensure contractor's settlement funds are paid promptly.

Before entering into a Mini-Trial, the Government party must ensure it has identified the funds it will use to settle the dispute. If the contractor knows settlement funding will be paid quickly, it will be less inclined to opt for a Board or court decision.

Recommendation # 6: Provide principals with the authority to make sound business decisions in a Mini-Trial without the risk of being second-guessed.

Second-guessing can undermine the Mini-Trial process. If principals know their settlement decisions will receive unnecessary scrutiny, their decisions will include other non-trial factors. However, if the principals know their decision will not be subject to second-guessing, they will make the best settlement based on the facts presented during the trial.

Recommendation # 7: Establish a central point of contact or ombudsman within each agency to answer contractor's questions regarding the Mini-Trial and ADR.

If contractors and their attorneys have an objective point of contact to answer their questions, it may help them make informed decisions on whether to participate in ADR.

Recommendation # 8: Conduct face-to-face meetings between Government and contractor senior management without the presence of either side's attorneys in order to convince them that the Mini-Trial is in both parties' best interest.

An informal meeting will give the Government the opportunity to convince its contractor counterparts that the Mini-Trial (or other ADR technique) is in both parties'

"best interests". By eliminating the participation of each party's attorneys, senior managers independently decide which forum should be used to resolve the dispute.

If the Government follows these recommendations, the researcher believes both contractors and Government agencies will be more willing to use the Mini-Trial to resolve contract disputes.

D. ANSWERS TO RESEARCH QUESTIONS

1. Primary Research Question

How could the United States Navy most effectively utilize the Mini-Trial as a method of alternative dispute resolution?

The Navy could best utilize the Mini-Trial by selectively choosing which disputes it tries to resolve using the Mini-Trial. As discussed earlier, not all disputes can or should be resolved using the Mini-Trial. For example, in circumstances where the dispute can be resolved through unassisted Negotiation, the Mini-Trial should not be considered since it would merely prolong the dispute and incur unnecessary legal fees. However, when the circumstances are ripe for the use of the Mini-Trial, the Navy should attempt to convince the contractor that resolving the dispute using the Mini-Trial is in both parties' best interests. Furthermore, once the decision has been made to use the Mini-Trial, senior Navy management should provide the principal with the requisite authority to settle the dispute. Second-guessing on the part of senior management should be minimized in order to empower the principal to make a sound business settlement based on the facts presented during the trial. If the Navy selects a principal with sound business judgment,

strong negotiations skills, and the necessary time to devote to the trial, there should be no reason to second-guess his decision. If senior management does not have faith in the principal's decision-making, he should not be selected to serve as the Navy's principal.

2. Secondary Research Questions

a. What is the Mini-Trial technique and how does it function?

The Mini-Trial is a structured voluntary settlement process that allows both parties to submit their positions on a dispute to senior management principals who have the authority to settle the dispute, or to a third party neutral who helps facilitate discussion between the principals. Whether a third party is involved or not, the principals are the only players who have the authority to resolve the issues at hand. After the parties agree to use the Mini-Trial, they will jointly draft a Mini-Trial agreement document that outlines the procedures and format that will be followed during the trial. This document also outlines the role that will be filled by the third party neutral. The neutral can fill a variety of roles, such as evaluator, facilitator, or mediator. The Mini-Trial allows for a shortened pre-trial preparation and condensed *best case* presentations by both parties. Upon completion of the presentations, the principals attempt to negotiate a settlement, often with the assistance of a third party neutral. If the parties are able to resolve the dispute, they will sign a settlement agreement that documents the key ingredients of their resolution. Like many other ADR techniques, the Mini-Trial is voluntary and non-binding; therefore a party can drop out at any point in the process.

b. What are the laws and regulations associated with the Mini-Trial and ADR?

None of the laws and regulations researched address the Mini-Trial in any detail. However, several of the laws and regulations strongly encourage Government agencies to utilize alternative dispute resolution (ADR) to the maximum extent practical. In addition to encouraging the use of ADR, the Contract Disputes Act of 1978 established the procedures and time frames for parties to file disputes. The Administrative Dispute Resolution Act (ADRA) of 1990 had the greatest impact on ADR by permitting Contracting Officers to utilize ADR to resolve contract claims. The Act mandated that each Federal agency develop its own ADR policy, appoint a senior official as "Dispute Resolution Specialist", and conduct training for agency attorneys in the field. Its impact on the Mini-Trial was felt most when the Act authorized agencies to use both public and private third party neutrals and permitted the sharing of neutrals among agencies. The Federal Acquisition Streamlining Act (FASA) of 1994 stressed the importance of using ADR to resolve contract disputes and required parties to explain in writing the reason for rejecting another party's request for ADR. The FASA also simplified the rules governing the procurement of neutrals without competition. The Administrative Dispute Resolution Act of 1996 made permanent the articles outlined in ADRA 1990. It also protected all communications between a neutral and parties from disclosure under the Freedom of Information Act. The Federal Acquisition Regulation (FAR) echoed in writing the importance of ADR as it was stressed in earlier legislation. Executive Orders 12988 and 12979 also provided Presidential support for the use of ADR.

c. To what extent has the Navy utilized the Mini-Trial and what have been the results of its use?

Dating back to its beginnings, the Navy has had a great deal of success with the Mini-Trial. During the 1980's, the Mini-Trial was one of the primary dispute resolution methods used by the Navy. The researcher discovered numerous magazine articles that mentioned the Navy's successful use of the Mini-Trial. Unfortunately, no hard statistics of the Navy's use of the Mini-Trial were available. By the late 1980's, the Mini-Trial's use was in decline due to the adoption of less formal and less complex ADR techniques. Although its use had declined from its peak use in the middle 1980's, the Navy has continued to use the Mini-Trial when it believed the Mini-Trial was the appropriate technique to resolve a given dispute. The Naval Sea Systems Command's successful use of the Mini-Trial in resolving a complex, multi-million dollar dispute with Westinghouse Corporation in 1996 is continuing proof of the Navy's willingness to use Mini-Trial to resolve contract disputes.

d. What are the measures of success in employing the Mini-Trial and under what conditions should the Mini-Trial be considered for use?

As discussed in Chapter VI and Conclusion # 1, the primary measures of success for the Mini-Trial are the following: resolution of the dispute, cost and time savings achieved, preservation of the parties' on-going working relationship, and whether the parties would consider using the Mini-Trial again in a future dispute. Other measures of success discussed in Chapter VI included narrowing of the issues in the event the parties

were unable to resolve the dispute, partial resolution of some parts of the dispute, giving the parties their "day in court", and being able to rationally defend the settlement.

Assuming no ADR "show-stoppers" (e.g., fraud, need for a precedence, anti-ADR attitudes) exist, the Mini-Trial should be used when the following conditions exist: the dispute is primarily factual (no complex legal issues involved), the parties want to maintain control over the outcome of the dispute, both parties recognize some liability in the dispute, a fairly clear entitlement to consideration exists and the primary task is to determine the quantum, the dollar amount in dispute is sufficiently large enough to warrant the time and expense of a Mini-Trial, the parties want to preserve an on-going working relationship, and senior management is willing to devote sufficient time and support to the dispute.

e. What actions should the Navy take to most effectively utilize the Mini-Trial as a viable form of ADR?

First and foremost, the Navy should conduct ADR awareness training for all Contracting Officers, Program Managers, and other senior contracting officials. Without their understanding of what the Mini-Trial (and ADR) is, how it works, and when it should be used, there will be little support for resolving the disputes outside of formal litigation. Once senior contracting officials are trained, the Navy should conduct Mini-Trial training for its field office attorneys. As discussed earlier, the skills necessary to prepare and present a Mini-Trial case are not the same skills used in litigation. Attorney training should include discussion of the Mini-Trial's structure and procedures, drafting of pre-trial agreements, and preparation and presentation techniques. The Navy should also publicize its willingness to use and its success with the Mini-Trial. If contractors and their

attorneys do not know the Navy is willing to use the Mini-Trial, they will not request it to resolve a future dispute. Finally, the Navy should ensure settlement funding has been identified and is available prior to entering the Mini-Trial. If the contractor knows there will be no difficulty receiving its settlement funds, it will be more inclined to enter into the Mini-Trial and other ADR techniques.

E. AREAS FOR FURTHER STUDY

The following are areas for future research dealing with the Mini-Trial:

1. Examine the qualifications a neutral should possess to be an effective Mini-Trial neutral. It would be interesting to see if the qualifications necessary to be an effective Mini-Trial neutral are the same needed to be an effective neutral in other alternative dispute resolution techniques that involve neutrals.

2. Explore the problems the Government has encountered with both Government and private attorneys during Mini-Trials. The researcher received several survey responses that noted that there were just as many problems with attorneys as there had been with neutrals and principals during Mini-Trials.

3. Examine the barriers that exist to successfully convince the Government to participate in a Mini-Trial.

4. Prepare detailed case studies of successful and unsuccessful Navy Mini-Trials. These case studies could be used as training materials for Navy and other Department of Defense attorneys.

APPENDIX

The following individuals participated in the researcher's Mini-Trial survey:

Government

1. Mr. Robert C. Ashpole, Trial Attorney, U.S. Navy Litigation Office
2. Mr. Steven Banks, Trial Attorney, U.S. Navy Litigation Office
3. Mr. Paul Buonaccorsi, Senior Executive Service, Naval Sea Systems Command
4. Mr. Frank Carr, Chief Trial Attorney and Agency Dispute Resolution Specialist, U.S. Army Corps of Engineers
5. Mr. John Dale, Associate Counsel, Naval Sea Systems Command
6. Mr. Jim Delanoy, Deputy Dispute Resolution Specialist, U.S. Navy Litigation Office
7. Mr. Jeffrey Domber, Assistant Regional Counsel, General Services Administration Office of Regional Counsel
8. Mr. Richard D. Hipple, Senior Trial Attorney, U.S. Navy Litigation Office
9. Mr. Joseph M. McDade, Deputy Dispute Resolution Specialist, U.S. Air Force Office of General Counsel
10. Lieutenant Colonel Paul D. Hoburg, Associate Counsel, Office of the Command Counsel, U.S. Army Material Command
11. Colonel Nicholas Retson USA, Senior Counsel, Office of the Command Counsel, Headquarters, U.S. Army Material Command
12. Ms. Patricia J. Sheridan, Deputy Dispute Resolution Specialist, Department of Veterans Affairs Board of Contract Appeals
13. Mr. John M. Taffany, Trial Team Attorney, Wright-Patterson Air Force Base
14. Mr. Mark O. Wilkoff, Deputy Dispute Resolution Specialist, U.S. Navy Litigation Office

Boards of Contract Appeals Judges

1. Honorable Martin J. Harty, Chairman, Armed Services Board of Contract Appeals

2. Honorable Allan H. Goodman, Judge, General Services Administration Board of Contract Appeals

3. Honorable Wesley C. Jockisch, Chairman, U.S. Army Corps of Engineers, Engineering Board of Contract Appeals

4. Honorable Steven Reed, Judge, U.S. Army Corps of Engineers, Engineering Board of Contract Appeals

5. Honorable R. Sollibakke (retired), Former Chairman, Armed Services Board of Contract Appeals

Private Attorneys

1. Mr. David Z. Bodenheimer, Partner, Crowell & Mooring, P.C.

2. Mr. Donald G. Gavin, Partner, Wickwire Gavin, P.C.

3. Honorable Robert Gomez, Partner, Basinelli, Brown, Touhey, and Kelly, P.C. and former Armed Services Board of Contract Appeals Judge

4. Mr. Raymond McCann, Senior Counsel, Litton Industries, Inc.

5. Honorable Robert J. Robertory, Counselor At Law and former Armed Services Board of Contract Appeals Judge

6. Mr. Richard Russin, Group Counsel, Litton Industries, Inc.

7. Mr. George Ruttinger, Partner, Crowell & Mooring, P.C.

8. Mr. Richard Walters, Partner, Piper Marbury, P.C.

LIST OF REFERENCES

1. Administrative Conference of the United States, Office of the Chairman, "Toward Improving Agency Dispute Resolution: Implementing the ADR ACT", *Report of the Administrative Conference of the United States*, Washington DC, February 1995.

2. Armed Services Board of Contract Appeals, "Notice Regarding Alternative Methods of Dispute Resolution", 14 December 1993.

3. Armed Services Board of Contract Appeals, "Settlement Agreement of the Appeal of Westinghouse Electric Corporation", ASBCA No. 49872, 18 October 1996.

4. Arnavas, Donald P., Hornyak, Joseph P., "Alternative Dispute Resolution: Edition II", *Briefing Papers*, Second Series, Federal Publications Inc., Washington DC, October 1996, pg. 1-12.

5. Bradley, Leigh, Hildebrandt, Arthur H., "Policy on the Use of Bench Decisions Before the Armed Services Board of Contract Appeals", General Counsel of the Navy Policy Memorandum, 31 March 1997.

6. Carr, Frank, Delanoy, James T., McDade, Joseph M., "Alternative Dispute Resolution: A Streamlined Approach to Resolving Differences", *Topical Issues in Procurement Series* (TIPS), National Contract Management Association, Vol. 6, No. 2, February 1995, pg.1-14.

7. Collins, Richard C., "Neutral Analysis of the Goodyear Tire and Rubber Company", *U.S. Army Corps of Engineers Alternative Dispute Resolution Series*, case Study #5, IWR CS 89-ADR-CS-5, August 1989.

8. Coulson, Robert, "The Immediate Future of Alternative Dispute Resolution", *Pepperdine Law Review* (Symposium Issue on Alternative Dispute Resolution),Vol.14, No. 4, 1987, pg. 770-782.

9. Davis, Keller, & Davis, "Why Alternative Dispute Resolution", htt*p://www.dkusa.com/v3-2adr.htm*, updated 28 March 1996.

10. *Defense Federal Acquisition Regulation Supplement (DFARS)*, Washington DC, 26 September 1996.

11. Delanoy, James, McDade, Joseph M., "Air Force ADR Program: Lessons Learned", draft memorandum, undated.

12. Department of the Air Force, "Training for Air Force Dispute Resolution Specialists", Secretary of the Air Force, Office of General Counsel, Spring 1995.

13. Department of Justice, Civil Division, "Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts", ADR Pamphlet, August 1992.

14. Department of Veteran Affairs, "Alternative Dispute Resolution", Office of General Counsel Directive, No. 02-97-01, Washington DC, 16 June 1997.

15. Domber, Jeffrey, "ADR: Underway at GSA", *Contract Management*, November 1996, pg. 54-56.

16. Douglas, Timothy, Davis, J.P., "Westinghouse Claim: Brief to Admiral Giambastiani", Naval Sea Systems Command briefing papers, 07 March 1996.

17. Eaton, David S., "Alternative Dispute Resolution: A Viable Method for Settling Government Contract Disputes", Naval Post Graduate School, Monterey CA, TH 93-B-02, June 1993.

18. Edelman, Lester, Carr, Frank, Creighton, James L., "The Mini-Trial", *U.S. Army Corps of Engineer's Alternative Dispute Resolution Series* (Pamphlet 1), IWR P 89-ADR-P-1, April 1989.

19. *Federal Acquisition Regulation*, Commerce Clearing House Inc., Chicago, Illinois, 16 May 1996.

20. Femino, Dominic A., "Mini-Trial Briefing for AMC Working Group on ADR", U.S. Army Material Command briefing papers, 19 October 1995.

21. Goodman, Allan H., "Alternative Dispute Resolution at the General Services Administration Board of Contract Appeals", *www.erols,com/arbmed/article.htm*, updated 27 April 1997.

22. Harty, Martin J., "Alternative Dispute Resolution—How Is It Working", materials for Board of Contract Appeals Bar Association Panel on ADR (Annual Meeting), 25 October 1996.

23. Harty, Martin J., "Results of Surveys of Boards of Contract Appeals Judge's Attitudes Towards Alternative Dispute Resolution", memorandum, October 1996.

24. Harty, Martin J., "Results of Survey of Boards of Contract Appeals Judges' Attitudes Towards Alternative Dispute Resolution", memorandum, October 1994.

25. Hoburg, Paul D., Donovan, Mark, "ACALA Pilot Test: After-Action Report", U.S. Army Material Command, 08 August 1996.

26. Jockisch, Wesley C., Judge, U.S. Army Corps of Engineer's Engineering Board of Contract Appeals, "Mini-Trial: First Impressions Notes", 1987.

27. Long, Andre, Wehrle-Einhorn, Robert J., "The Mediation Alternative: Guiding the Acquisition Work Force from Theory to Practice", *National Contract Management Journal*, March 1996, pg. 1-7.

28. Mayer, James H., "Alternative Dispute Resolution Procedures: How To Do More For Less Cost", *Contract Management*, February 1994, pg. 11-15.

29. McDade, Joseph M., "The Air Force ADR Program", *Contract Management*, November 1996, pg. 39-41.

30. McDade, Joseph M., "Alternative Dispute Resolution: Practical Advice for Contract Attorneys" Department of the Air Force, Office of General Counsel (draft transcript), Fall, 1996.

31. McDade, Joseph M., "Guidelines for Using Alternative Dispute Resolution", *Department of the Air Force Alternative Dispute Resolution Program: Training for Air Force Dispute Resolution Specialists*, Department of the Air Force, Washington DC, Spring 1995.

32. McDade, Joseph M., "Key Provisions of the Administrative Dispute Resolution Act of 1990", *Department of the Air Force Alternative Dispute Resolution Program: Training for Air Force Dispute Resolution Specialists*, Washington DC, Spring 1995.

33. Metaxas, John C., "Alternatives to Litigation are Maturing; But are the Goals Valid", *The National Law Journal*, 12 May 1986, pg.2-9.

34. National Contract Management Association, "Use of ADR to Improve Contract Performance: Seminar on Alternative Dispute Resolution", (sponsored by Office of Federal Procurement), Summer 1996.

35. Naval Sea Systems Command, "Lessons Learned: Westinghouse Electric Company Alternative Dispute Resolution", Fall, 1996.

36. Page Reba, Jockisch, Wesley C., "The Corps of Engineers Board of Contract Appeals Use of Alternative Dispute Resolution", *Public Contract Law Journal*, Vol. 24, No. 3, Spring 1995, pg. 453-471.

37. Public Law 101-552, *Administrative Dispute Resolution Act of 1990*, 26 October 1990.

38. Reichardt, David L., "Avoiding Litigation: The Ultimate Finesse", *Contract Management*, July 1986, pg. 8-9.

39. Robertory, Robert J., Gomez, Robert, "Mini-Trials", *Alternative Means of Resolving Disputes* (draft), George Washington University Press, Washington DC, May 1997.

40. Rumbaugh, Charles E., Shapiro, Steven A., "Using Alternative Dispute Resolution to Resolve Government, Prime Contractor, and Subcontractor Disputes", *Contract Management*, July 1997, pg. 23-25.

41. Shapiro, Steven A., Rumbaugh, Charles E., "Alternative Dispute Resolution: Recent Initiatives and Techniques for Professionals", *Contract Management,* January 1997, pg. 4-7.

42. Stipanowich, Thomas J., "Beyond Arbitration: Innovation and Evolution in the United States Construction Industry", *Wake Forest Law Review*, Vol. 31, No. 1, Spring 1996, pg. 65-182..

43. Susskind, Thomas J., Podziba, Susan L., Babbit, Eileen, "Betchel National, Inc.", *U.S. Army Corps of Engineers Alternative Dispute Resolution Series*, (Case Study #4), IWR Case Study 89-ADR-CS-4, August 1989.

44. Susskind, Lawrence E., Babbit, Eileen, Hoffer, David, "General Roofing Company", *U.S. Army Corps of Engineers Alternative Dispute Resolution Series* (Case Study # 9), IWR CS 92-ADR-CS-9, January 1992.

45. Susskind, Lawrence E., Podziba, Susan L., Babbit, Eileen, "Tenn Tom Constructors, Inc.", *U.S. Army Corps of Engineers Alternative Dispute Resolution Series* (Case Study #1), IWR CS 89-ADR-CS-1, August 1989.

46. Susskind, Lawrence E., Podziba, Susan L., Babbit, Eileen, "Goodyear Tire and Rubber Company", *U.S. Army Corps of Engineers Alternative Dispute Series* (Case Study #5), IWR CS 89-ADR-CS-5, August 1989.

47. United States Army Material Command, "Alternative Dispute Resolution Program: Progressive Approaches and Creative Initiatives to Meet the Litigation Challenge", ADR Pamphlet, Alexandria VA, undated.

48. United States Claims Court, *General Order No.13,* undated.

49. United States General Accounting Office, Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, GAO/GGD-97-157, Washington DC, August 1997.

50. Wilkinson, John, "Assessing the Odds of Settling Disputes with ADR", *The National Law Journal*, 11 April 1994.

51. Woods, Robert E., "What are the Benefits to Alternative Dispute Resolution", *Advantage Newsletter, http://www.briggs.com/adr.htm*, Summer 1995.

52. VanLuit, Frederick M., "Alternative Dispute Resolution: A Case Analysis of A Negotiated Settlement" Naval Postgraduate School, Monterey CA, TH-94D-07, June 1994.

INITIAL DISTRIBUTION LIST

	No. of Copies
1. Defense Technical Information Center 8725 John J. Kingman Rd. STE 0944 Ft. Belvoir, VA 22060-6218	2
2. Dudley Knox Library Naval Postgraduate School 411 Dyer Rd. Monterey, CA 93943-5101	2
3. Defense Logistics Studies Information Exchange U.S. Army Logistics Management College Fort Lee, VA 23801-6043	1
4. Dr. David V. Lamm (Code SM/Lt) Naval Postgraduate School Monterey, CA 93943	5
5. Mr. Mark Stone (Code SM/St) Naval Postgraduate School Monterey, CA 93943	1
6. CAPT. Robert Cowley SC, USN Assistant Commander for Contracts Naval Air Systems Command HQ 47123 Buse Rd., Unit 543 Patuxent River, MD 20670-1547	1
7. Mr. Joseph McDade, Esq. Department of the Air Force Room 4-D980 SAF/GCO 1740 Air Force Pentagon Washington, DC 20330-1740	1
8. LCDR Steven Morgan SC, USN 6015 Lamont Ct. Springfield, VA 22152	2

DUDLEY KNOX LIBRARY
NAVAL POSTGRADUATE SCHOOL
MONTEREY CA 93943-5101

DUDLEY KNOX LIBRARY
3 2768 00342318 7